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Does the World Need Knights Errant to Combat Enemies of All Mankind? Universal Jurisdiction, Connecting Links, and Civil Liability

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* Candidate for J.D., Washington and Lee University School of Law, May 2010. Many thanks go to Professor Mark Drumbl and Garrett Ledgerwood for their invaluable comments and criticisms along every step of the way. I would also like to thank everyone else who helped and/or endured me while writing this Note—especially my parents, without whom I never could have gotten this far.

> There are also those who think, that an act of cruelty committed, for example, at Constantinople, may be punished at Paris; for this abstracted reason, that he who offends humanity, should have enemies in all mankind, and be the object of universal execration; as if judges were to be the knights errant of human nature in general, rather than guardians of particular conventions between men.[1]

I. Introduction

Universal jurisdiction is the ability of national courts to try defendants for international crimes committed outside the state's regular jurisdiction, to convict defendants who may have had no connection with the prosecuting state prior to trial, and to bring accountability and justice to corners of the world where they are sorely lacking.[2] At least in theory, anyway—in practice,

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1. CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 84 (Adolph Caso ed., Branden 4th ed. 1992) (1775).

2. *See* Kenneth Roth, *The Case for Universal Jurisdiction*, 80 FOREIGN AFF., Nov.–Dec. 2001, at 150, 150 ("With growing frequency, national courts operating under the doctrine of universal jurisdiction are prosecuting despots in their custody for atrocities committed abroad. Impunity may still be the norm in many domestic courts, but international justice is an increasingly viable option . . . ."). For the purposes of this Note, universal jurisdiction means the exercise of jurisdiction by a national court over a criminal defendant charged with serious violations of international law, when territoriality, physical presence, passive personality, or the protective principle fail to provide a basis for jurisdiction. "Unlimited universal jurisdiction" or "unlimited jurisdiction" shall be defined as universal jurisdiction exercised in the complete absence of any connecting links between the prosecuting state and the defendant. *Cf.* PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION Principle 1(1) (2001) ("[U]niversal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction."). A "connecting link" or "nexus" refers to some connection, normally insufficient to meet a traditional basis for jurisdiction, between the defendant and the prosecuting state. For a discussion and more articulate definition of universal jurisdiction with connecting links, see

universal jurisdiction has been less potent and more problematic.[3] Recently, two important developments in universal jurisdiction have occurred: Rose Kabuye, Rwanda's Director of State Protocol, was arrested in Germany for extradition to France in order to stand trial for her putative role in causing genocide *against her own ethnic minority*,[4] and Charles Taylor, Jr., was convicted in the United States under the Extraterritorial Torture Statute[5] for committing torture in Liberia.[6] These two cases highlight the hit or miss nature of universal jurisdiction: Sometimes universal jurisdiction is exercised against the worst violators of human rights,[7] and sometimes it targets people of dubious guilt.[8] Prosecutions under universal jurisdiction occasionally achieve success,[9] but more often than not they end in failure.[10] This Note argues that a key factor in the success of universal jurisdiction is the presence of some connecting link

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infra Part IV.B.1.

3. *See, e.g.*, *infra* Parts II.D.1–2 (describing the failure of universal jurisdiction prosecutions in Belgium and Spain to produce judgments against the defendants).

4. *See Senior Rwandan Official Arrested*, BBC NEWS, Nov. 10, 2008, http://news.bbc.co.uk/2/hi/africa/7718879.stm (last visited Sept. 29, 2009) (discussing the charges against Kabuye, which allege that Tutsi rebels assassinated Rwandan President Habyarimana in order to seize power) (on file with the Washington and Lee Law Review). Insofar as the French prosecution blames the victims for the genocide, it is controversial; the more accepted theory is that Habyarimana was killed by Hutu extremists, who used his death as a pretext to instigate the genocide leading to the slaughter of 800,000 Tutsis. *Id.*

5. *See* Extraterritorial Torture Statute, 18 U.S.C. §§ 2340–2340A (2006) (defining torture and granting criminal jurisdiction over alleged torturers who are U.S. nationals or are present in the United States, regardless of the nationality of the victim or defendant).

6. *See Son of Ex-Liberian Leader Sentenced to 97 Years in Prison*, CNN NEWS, Jan. 9, 2009, http://edition.cnn.com/2009/CRIME/01/09/taylor.torture.sentencing/index.html (last visited Sept. 29, 2009) (reporting on the conviction of Charles Taylor Jr. and an upcoming class action civil suit against him by his victims) (on file with the Washington and Lee Law Review). While jurisdiction over the defendant came from his American citizenship, and not some theory of universal jurisdiction, the case still remains important as the first conviction under the Extraterritorial Torture Statute and a seminal judicial discussion of the constitutionality of universal jurisdiction. *See* Julian Ku, *U.S. Court Convicts "Chucky" Taylor of Torture*, OPINIO JURIS, Nov. 2, 2008, http://opiniojuris.org/2008/11/02/us-court-convicts-chucky-taylor-of-torture (last visited Sept. 29, 2009) (discussing the legal aspects of jurisdiction in the Taylor trial) (on file with the Washington and Lee Law Review).

7. *See infra* Parts II.C.1–2 (discussing Spanish and Belgian indictments of war criminals, torturers, and tyrants).

8. *See, e.g.*, *supra* note 4 and accompanying text (noting the indictment of Rose Kabuye); *infra* note 116 and accompanying text (noting the indictments of George H. W. Bush and Colin Powell).

9. *See, e.g.*, *infra* notes 109–12 and accompanying text (discussing a successful prosecution of Belgian génocidaires based on a theory of universal jurisdiction).

10. *See infra* Part IV.A.3 (discussing the impotence of unlimited universal jurisdiction).

between the prosecuting state and the defendant.[11] When universal jurisdiction is exercised in the absence of any connecting links, it tends to be abusive, intrusive, and ultimately fruitless.[12]

Few international legal issues are as powerful or contentious as universal jurisdiction. Supporters of universal jurisdiction laud its potential to bring heinous criminals to justice and end impunity for atrocity,[13] while critics decry the imposition of one state's judiciary into the sovereignty of another state as "the tyranny of judges."[14] At the crux of this debate is the very real power of universal jurisdiction to reach across borders and influence the society and laws of other nations.[15] But should the decidedly noble cause of achieving justice permit one state to perform the legal and moral obligations of another state, even when the other state objects? These conflicting principles of sovereignty and accountability implicated by universal jurisdiction are core values of the international legal system.[16] This Note will argue that connecting links to the forum state are the best way to reconcile accountability with sovereignty and ensure the responsible and meaningful exercise of universal jurisdiction.

Granted, imposing a connecting links requirement—or any other concrete limitation[17]—on universal jurisdiction will result in situations where an undeniably guilty defendant escapes prosecution.[18] In that case, *civil*

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11. For analysis of what constitutes a connecting link, see *infra* Part IV.B.1. The most salient connecting link for a prosecution would be the physical presence of a defendant in the territory of the prosecuting state, though other connecting links also exist.

12. *See infra* Part IV.A (critiquing universal jurisdiction exercised without connecting links).

13. *See* Roth, *supra* note 2, *passim* (advocating for universal jurisdiction).

14. HENRY KISSINGER, DOES AMERICA NEED A FOREIGN POLICY? 273 (2001).

15. *Compare* Naomi Roht-Arriaza, *Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala*, 9 CHI. J. INT'L L. 79, 106 (2008) ("[T]ransnational prosecutions . . . can play complementary roles in catalyzing changes in domestic ability and will to investigate and prosecute the powerful. [Success] should be measured not only (or even principally) by how many convictions they secure, but at how well they succeed in changing the possibilities for justice at home."), *with* KISSINGER, *supra* note 14, at 275–76 ("The world should think carefully about the implications of a procedure by which a single judge is able, essentially at his personal discretion, to assert jurisdiction . . . and to demand extradition . . . without regard to the conciliation procedures that might exist in the country of the accused . . . .").

16. *See* U.N. Charter pmbl. (stating the members' determination "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained"); *id.* art. 2, para. 4 ("The [United Nations] is based on the principle of the sovereign equality of all its Members.").

17. *But cf.* PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION Principle 1(5) (2001) (imposing a good faith requirement for the exercise of universal jurisdiction).

18. *See* Stephanie Nolan, *Can Ottawa Act Against Mugabe?*, GLOBAL POLICY FORUM, Nov. 5, 2004, http://www.globalpolicy.org/intljustice/universal/2004/1105mugabe.htm (last

jurisdiction should supplement universal criminal jurisdiction with connecting links, creating a judicial forum in which victims can seek relief even when no connecting links for criminal prosecutions exist. This Note will argue that such a combination of civil and criminal jurisdictions moderates the excesses of unlimited universal jurisdiction while providing equal accountability and justice.

This Note analyzes the theory and practice of universal jurisdiction, both with and without connecting links and for criminal and civil trials. Part II examines universal criminal jurisdiction, briefly outlining the historical development of the theory and discussing some of the more colorable contemporary exercises of universal jurisdiction in national courts. Part III explores the use of civil jurisdiction to redress violations of international law. Finally, Part IV reviews the drawbacks of an unlimited universal jurisdiction regime and contends that a combination of universal criminal jurisdiction with connecting links and expansive civil jurisdiction is a superior alternative.

II. Universal Criminal Jurisdiction

Part II of this Note will address the developing practice of universal jurisdiction in international criminal law. Part II.A will discuss the customary bases of jurisdiction that states use to justify the exercise of their jurisdiction, while Part II.B will briefly outline the historical development of universal jurisdiction in international law, with a focus on the requirement of connecting links. In Part II.C this Note will examine universal jurisdiction in practice, surveying its exercise by different countries in order to highlight the varying degrees to which universal jurisdiction is used today.

A. Bases of Jurisdiction

In the abstract, jurisdiction is the power of a state "to exercise authority over all persons and things within its territory."[19] Traditionally, jurisdiction has been based on principles of territoriality, nationality or residence, passive

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visited Sept. 29, 2009) (discussing the unsuccessful attempt by human rights advocates to find some connecting link between Canada and Robert Mugabe's abuses in Zimbabwe in order to be able to indict Mugabe for crimes against humanity under Canadian law) (on file with the Washington and Lee Law Review). But even if the connecting links requirement did not exist and a prosecution against Mugabe could be made under Canadian law, it seems unlikely that such a prosecution would actually accomplish anything.

19. BLACK'S LAW DICTIONARY 867 (8th ed. 2004).

personality, or protection of state interests.[20] Territorial jurisdiction is the fundamental jurisdiction exercised by states over crimes committed in whole or in part within their own territory.[21] The effects doctrine also allows states to exercise territorial jurisdiction over crimes committed outside of a state's territory but producing harmful effects within its territory.[22]

Bases for extraterritorial jurisdiction over crimes committed outside of the prosecuting state traditionally have some connecting link or nexus to the prosecuting state.[23] Nationality (or active personality) jurisdiction may be asserted by states whose nationals are suspected of committing a crime, regardless of where the crime itself was committed.[24] States whose nationals are victims of extraterritorial crimes may assert passive personality jurisdiction,[25] and the protective principle allows states to exercise jurisdiction against all crimes that threaten their national security or vital interests.[26] Jurisdiction based upon territoriality or nationality is the most accepted basis for asserting jurisdiction, while other extraterritorial forms of jurisdiction are newer developments.[27]

Universal jurisdiction is the newest and least accepted jurisdictional basis.[28] The simplest definition of universal jurisdiction is the exercise of jurisdiction by a state over a defendant when none of the traditional bases for jurisdiction are fulfilled.[29] Academic terminology varies widely, but at the far

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20. MITSUE INAZUMI, UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW 21–25 (2005).

21. *Id.* at 22; *see also* SS Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 20 (Sept. 7) ("[I]n all systems of law the principle of the territorial character of criminal law is fundamental . . . .").

22. INAZUMI, *supra* note 20, at 22.

23. *See id.* at 23 ("States exercise their jurisdiction based on some nexus (linkage) to the crime concerned, and diverse bases of jurisdiction based on different nexuses were acknowledged under international law.").

24. *Id.* at 24.

25. *Id.*

26. *Id.* at 25.

27. *See id.* at 31 ("Apart from the recognition of territorial jurisdiction as the most basic principle, the scope and extent of the acceptance of other forms of jurisdiction among States were unclear under classic international law.")

28. *See* M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, *in* UNIVERSAL JURISDICTION 39, 40 (Stephen Macedo ed., 2004) ("[W]hile universal jurisdiction is attaining an important place in international law, it is not as well established in conventional and customary international law as its ardent proponents, including major human rights organizations, profess it to be.").

29. *See* INAZUMI, *supra* note 20, at 25 ("[U]niversal jurisdiction is exercised by States having no relation to territorial or nationality aspects."). For Inazumi's extensive analysis of

end of the spectrum lies a concept of all-encompassing, truly unlimited universal jurisdiction.[30] Unlimited universal jurisdiction is usually justified by the existence of international values and interests, and a corresponding international need to prosecute and deter violations of those values, even at the expense of the sovereignty of other states.[31] With such a justification, "there is no need for a link or nexus between the enforcing power, be it national or international, and the conduct in question, or the perpetrator or victim's nationality. Universal jurisdiction is . . . based solely on the nature of the crime."[32] But such an assertion is not entirely true: The requirement of connecting links has long been used in the discussion of universal jurisdiction,[33] and perhaps mandating such a nexus is superior to the bold infringements of state sovereignty which unlimited universal jurisdiction encourages.[34]

Regardless of variety, the exercise of universal jurisdiction is usually reserved for only the most severe violations of international law.[35] Piracy, slavery, and banditry were the earliest crimes for which universal jurisdiction was allowed.[36] With its transnational element,[37] hijacking can easily be

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differing degrees of universal jurisdiction, see generally *id.* at 26–30.

30. *See id.* at 27 (distinguishing between ordinary universal jurisdiction and universal jurisdiction in absentia). This Note uses the term unlimited universal jurisdiction rather than universal jurisdiction in absentia because some formulations of universal jurisdiction prohibit trials in absentia but still permit investigation, indictment, and requests for extradition of absent defendants. *See, e.g.*, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION Principle 1(2) (2001) (prohibiting trials in absentia); *id.* Principle 1(3) (permitting states to request extradition on the basis of universal jurisdiction).

31. *See* Bassiouni, *supra* note 28, at 42 (describing the normative and pragmatic universalist positions).

32. *Id.* at 42–43.

33. *See* CrimC (Jer) 40/61 Attorney General of Israel v. Eichmann (*Eichmann I*), 36 I.L.R. 18, 51–52 (1961) (discussing the theories of several jurists, including Hugo Grotius, with regard to the requirement of connecting links); *see also infra* Part II.C (outlining reliance upon connecting links for universal jurisdiction in international law).

34. *See infra* Part II.C (tracing the development of universal jurisdiction, both with and without connecting links, in international law); *infra* Part IV.B.1 (making the argument for connecting links).

35. *See* Mary Robinson, *Preface* to UNIVERSAL JURISDICTION, *supra* note 28, at 15, 16 ("[U]niversal jurisdiction is based on the notion that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the perpetrator . . . .").

36. Bassiouni, *supra* note 28, at 47, 49.

37. *See* LUC REYDAMS, UNIVERSAL JURISDICTION 64 n.115 (2001) ("The offence of aircraft hijacking . . . is likely to show one or more international elements, e.g. international flight, international airspace, diversity of nationality between the hijackers and the crew, the passengers, the State of registration of the craft, or the 'target State.'").

analogized to piracy in order to justify the exercise of universal jurisdiction for it as well.[38] Universal jurisdiction may also be valid for apartheid[39] and certain acts of terrorism.[40] Major violations of *jus cogens* such as genocide, war crimes, crimes against humanity, and torture are offenses widely recognized as grounds for universal jurisdiction.[41] Aggression could also be a crime for which universal jurisdiction exists,[42] but because aggression is undefined under international law,[43] in practice it would be difficult to charge a defendant with this offense. Finally, the use of child soldiers might be considered such a grave breach of *jus cogens* principles as to merit the exercise of universal jurisdiction against it.[44]

B. The Development of Universal Jurisdiction in International Law

Universal jurisdiction developed around the crime of piracy.[45] Cicero was the first to label pirates and bandits as enemies of all mankind,[46] and the pirate, as a "*hostis humanis generis*" (enemy of all mankind), was subject to the

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38. *See* United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (asserting, *inter alia*, universal jurisdiction for a defendant charged with hijacking, or "air piracy").

39. See *infra* notes 74–78 and accompanying text for a discussion of universal jurisdiction under the Apartheid Convention.

40. *See* Hostage Taking Act, 18 U.S.C. § 1203(b)(1)(B) (2006) (granting jurisdiction over hostage taking offenses which occurred outside the United States if the offender is found in the United States).

41. *See* PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION Principle 2(1) (2001) (authorizing universal jurisdiction for genocide, war crimes, crimes against humanity, and torture).

42. *See id.* (authorizing universal jurisdiction for crimes against peace).

43. *See generally* Jackson Nyamuya Maogoto, *Aggression: Supreme International Offence Still in Search of Definition*, 5 S. CROSS U. L. REV. 1 (2002).

44. *See, e.g.*, Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, 122 Stat. 3735 (codified in scattered sections of 18 U.S.C.A. (West 2009)) (granting jurisdiction for the recruitment or use of child soldiers for a defendant present in the United States, regardless of nationality).

45. Bassiouni, *supra* note 28, at 47.

46. *See* MARCUS TULLIUS CICERO, DE OFFICIIS 384–85 (G. P. Gould ed., Loeb Classical Library 1928) (44 B.C.) ("[F]or a pirate is not included in the number of lawful enemies, but is the common foe [*communis hostis omnium*] of all the world . . . ."). Though popularly confused, Cicero is apparently not the source of the more common phrase *hostis humanis generis*, which comes from a paraphrase of Cicero by Lord Edward Coke. Thomas J.R. Stadnik, *Pirates—The Common Enemies of All*, LEXISNEXIS INT'L AND FOREIGN L. CTR, Dec. 18, 2008, http://law.lexisnexis.com/practiceareas/International--Foreign-Law-Blog/Treaties--Conventions/Pirates-The-Common-Enemies-of-All (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

jurisdiction of all states.[47] Though never as widespread, universal jurisdiction for bandits under the same rationale of *hostis humanis generis* also occurred: "[T]he towns of northern Italy had already in the Middle Ages followed the practice of trying specific types of dangerous criminals (*banniti, vagabundi, assassini*) who happened to be within their area of jurisdiction, without regard to the place in which the crimes in question were committed."[48] In 1815, the Vienna Declaration of the Congress of Vienna equated slave trafficking to piracy, and universal jurisdiction similarly developed for that offense.[49]

The use of universal jurisdiction for other violations of international law was slower to develop.[50] The Convention for the Prevention and Punishment of Genocide, for example, fails to mention universal jurisdiction.[51] Article 6 of the Convention states: "Persons charged with genocide . . . shall be tried by a competent tribunal *of the State in the territory of which the act was committed*, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[52] While Article 6 is not meant to preclude the exercise of other bases of jurisdiction,[53] it nevertheless fails to affirmatively support any international norm of universal

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47. INAZUMI, *supra* note 20, at 50.

48. CrimC (Jer) 40/61 Attorney General of Israel v. Eichmann (*Eichmann I*), 36 I.L.R. 18, 26 (1961) (citations omitted). Contemporary courts have inexplicably refrained from using this offense as grounds for universal jurisdiction, despite the resemblance of a genocidal conspiracy to a "gang of criminals." *Id.* For a detailed study of banditry and universal jurisdiction, see Willard B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177, 181–98 (1955). Cowles influentially argued for the extension of universal jurisdiction from brigands to war criminals, *id.* at 198–203, though his argument dealt only with the exercise of universal jurisdiction by belligerent states over defendants in their custody, *id.* at 178.

49. Bassiouni, *supra* note 28, at 49.

50. *See id.* at 47–56 (tracing the development of universal jurisdiction for crimes under international law).

51. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 569 (1995) (noting "the absence of a provision on universal jurisdiction in the Genocide Convention").

52. Convention on the Prevention and Punishment of the Crime of Genocide art. 6, *approved and opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention] (emphasis added).

53. U.N. Econ. & Soc. Council, *Conclusion of the Consideration of the Draft Convention on Genocide*, 717, U.N. Doc. A/C.6/SR. 134 (Dec. 2, 1948). As the Drafting Committee stated:

> The first part of Article VI contemplates the obligation of the State in whose territory acts of Genocide have been committed. Thus, *in particular*, it does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State.

Id. (emphasis added).

jurisdiction for genocide.[54] In contrast, the 1949 Geneva Conventions each state:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed . . . grave breaches [of the Convention], and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracted Party concerned, provided such High Contracting Party has made out a *prima facie* case.[55]

Though the precise extent of this obligation is debatable,[56] when read broadly the obligation to search out and prosecute violators of the Conventions constitutes an exercise of universal jurisdiction.[57] But which variation of universal jurisdiction do the 1949 Geneva Conventions support? "The text speaks of handing a suspect over for trial to another High Contracting Party *concerned*, which suggests that a link or interest is required."[58] While an expansive reading of the duty to find and prosecute grave breaches would vitiate any requirement of connecting links, it is unlikely that in 1949 the contracting parties intended to impose responsibility for violations of international law in any manner similar to the exercise of unlimited universal jurisdiction today.[59] The Genocide Convention and 1949 Geneva Conventions,

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54. *Supra* note 51 and accompanying text.

55. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, *adopted* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked art. 50, *adopted* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners at War art. 129, *adopted* Aug. 12, 1949, 6 U.S.T 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, *adopted* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

56. *Compare* REYDAMS, *supra* note 37, at 55 ("[A] State can only search on its own territory and can only bring before its courts suspects who are present there."), *with* Bassiouni, *supra* note 28, at 51 ("It is nevertheless valid to assume that the 1949 Geneva Conventions . . . provide a sufficient basis for states to apply universality of jurisdiction to prevent and repress the 'grave breaches' of the conventions.").

57. *See* REYDAMS, *supra* note 37, at 54 (discussing the academic debate over the meaning of the common jurisdiction clause of the 1949 Geneva Conventions). Reydams ultimately concludes, based upon subsequent state practice in applying the 1949 Geneva Conventions, that the common jurisdiction clause does exemplify universal jurisdiction. *Id.* at 55.

58. *Id.* at 55 (citations omitted). The equally authoritative French version translates "concerned" as "interessée à la poursuite," further emphasizing the importance of some connecting link. *Id.* at 55 n.71. Proposals explicitly requiring that extradition requests demonstrate some interest in the prosecution failed, however, to be incorporated into the Conventions. *Id.* at 55 n.72.

59. *See id.* at 55 ("[O]ne would not expect States at the Geneva Diplomatic Conference to hold a substantially different view on universal jurisdiction from that which they held just a year

while neither explicitly rejecting the practice nor supporting any exercise of jurisdiction in the absence of connecting links, indicate the amorphic nature of universal jurisdiction in international law at that time.[60]

Attorney General of Israel v. Eichmann[61] was one of the first modern cases of universal jurisdiction.[62] Given the non-existence of Israel as a country at the time these crimes were committed, passive personality and the protective principle were questionable grounds for jurisdiction.[63] The District Court nevertheless found that jurisdiction existed:

> The State of Israel's "right to punish" the accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind), which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and a specific or national

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earlier during the drafting of the Genocide Convention.").

60. *See id.* at 56 (questioning why the Geneva Conventions provided for universal jurisdiction when the Genocide Convention does not). Reydams offers three explanations: the more internationalized nature of war crimes, the recent world war, and the lack of attention due to the relative size of the Geneva Conventions. *Id.*

61. *See* CrimC (Jer) 40/61 Attorney General of Israel v. Eichmann (*Eichmann I*), 36 I.L.R. 18, 273–76 (1961) (convicting the defendant of crimes against the Jewish people, crimes against humanity, war crimes, and membership in hostile organizations). In 1960, Adolf Eichmann, a Nazi bureaucrat living under an assumed name in Argentina, was abducted by Israeli agents and taken to Israel to stand trial. *Id.* at 57. He was charged under Israel's Nazis and Nazi Collaborators (Punishment) Law for his role in organizing the logistics of the Holocaust. *Id.* at 20. The defense argued that Eichmann's abduction from Argentina violated international law, but the District Court dismissed the counsel's objections, reasoning that the defendant could not evade trial based upon the illegality of his arrest. *Id.* at 57–59. The defense also argued that Israel lacked jurisdiction over the defendant, but that argument failed as well. *Id.* at 20. Extensive findings of fact detailed the defendant's part in executing the Final Solution, including his role in the introduction of the poison gas Zyklon B to concentration camps. *Id.* at 86–235. The District Court found that Eichmann was not "merely a 'small cog' in the extermination machine" but instead was the head of those charged with carrying out the Final Solution. *Id.* at 226.

62. *See* REYDAMS, *supra* note 37, at 161 ("For lack of other precedents, *Attorney General of Israel* v *Eichmann* was for a long time at the centre of any discussion on universal jurisdiction."). Perhaps the first modern case of universal jurisdiction was *Public Prosecutor v. Milan T*, Oberster Gerichtshof [OGH] [Supreme Court] May 29, 1958, 29 Entscheidungen des österreichischen Obersten Gerichtshofes in Strafsachen [SSt] No. 32 (Austria). REYDAMS, *supra* note 37, at 98. In *Milan T*, Austria tried a Yugoslavian defendant for property crimes (fraud) committed in Yugoslavia after declining extradition due to fears of political persecution. *Id.*

63. For the defense counsel's arguments against these grounds for jurisdiction, see *Eichmann I*, 36 I.L.R. at 54. *But see id.* at 55–57 (applying the protective principle and passive personality retroactively as valid bases for jurisdiction).

> source, which gives the victim nation the right to try any who assault its existence.[64]

The defense challenged Israel's exercise of jurisdiction, maintaining that international law required a connection between the prosecuting state and the defendant.[65] Discussing the various academic positions regarding connecting links, the District Court concluded that, under any conception of connecting links, sufficient connections existed between the attempted extermination of the Jewish people in the Holocaust and the State of Israel.[66] It is unclear whether the District Court actually accepted the defense's argument that connecting links were necessary, only that it found sufficient links.[67]

On appeal, the Supreme Court of Israel fully affirmed the lower court's finding of jurisdiction,[68] though the articulation of the legal reasoning differed. The Supreme Court, relying on the reasoning of the *Lotus* case,[69] justified Israeli jurisdiction over Eichmann on the grounds that no international norm prohibiting such jurisdiction existed.[70] Analyzing various theories of jurisdiction, the Supreme Court found support for its absolute exercise of universal jurisdiction over Eichmann[71]—and then endorsed the District Court's finding of connecting links between Israel and Eichmann's Jewish victims.[72] Taken as a whole, the *Eichmann* opinions advance the torch of universal jurisdiction but fail to shed light on the possibility of requiring connecting

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64. *Id.* at 50.

65. *Id.*

66. *Id.* at 49–54.

67. *Id.*

68. *See* CrimA 336/61 Attorney General of Israel v. Eichmann (*Eichmann II*), 36 I.L.R. 277, 279 (1962) ("The District Court has in its judgment dealt with both categories of contentions in an exhaustive, profound and most convincing manner. We should say at once that we fully concur, without hesitation or reserve, in all its conclusions and reasons . . . .").

69. *See* SS Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7) (declaring that under international law states may act as they want, except when a positive rule exists prohibiting them from doing so).

70. *Eichmann II*, 36 I.L.R. at 283–85. Sovereignty concerns were mitigated by the fact that the West German government expressly declined to try the defendant in Germany. *See id.* at 287 (dismissing the defense's argument against jurisdiction in part upon that basis).

71. *See id.* at 298–304 (discussing theories of universal jurisdiction).

72. *See id.* at 304 ("It should be made clear that we fully agree with every word said by the [District] Court on [the matter of connecting links]."). The Supreme Court of Israel added: "If in our judgment we have concentrated on the international and universal character of the crimes of which the appellant has been convicted, one of the reasons for our so doing is that some of them were directed against non-Jewish groups . . . ." *Id.* It sounds like the courts may have resorted to unlimited universal jurisdiction in order to justify supplemental jurisdiction over the non-Jewish victims. *See infra* Part IV.B.3 (discussing supplemental jurisdiction over victims with no connection to the prosecuting state).

links; Israel's clear interest in punishing Nazis justifies various jurisdictional approaches, and resort to universality merely reinforces the courts' findings of jurisdiction.

After the *Eichmann* case, international law rapidly began to codify.[73] One early indication of this trend was the International Convention on the Suppression and Punishment of the Crime of Apartheid.[74] The parties to the Apartheid Convention agreed to "adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for" apartheid.[75] The Apartheid Convention also established jurisdiction over defendants charged with crimes of apartheid.[76] Because only the white minority regimes in Rhodesia, Namibia, and South Africa committed apartheid, and because those countries would never join the agreement, the universal jurisdiction created under Article V would never be used against any of the parties affirming it and could only be exercised against nationals of non-parties.[77] States were thus free to ratify the use of universal jurisdiction in the Apartheid Convention without fearing reciprocity.[78] While the Apartheid Convention was an important landmark for universal jurisdiction, it only stands for the proposition that states advocate universal jurisdiction most strongly when it can only be exercised against others.[79]

Though later international conventions did not go as far as the Apartheid Convention, a trend of including *aut dedere aut judicare* ("extradite or

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73. *See* REYDAMS, *supra* note 37, at 47 ("After World War II global and regional intergovernmental organizations became the driving forces behind an intensified treaty-making process.").

74. *See* International Convention on the Suppression and Punishment of the Crime of Apartheid, *adopted* Nov. 30, 1973, 1015 U.N.T.S. 243 (defining, criminalizing, and stigmatizing apartheid).

75. *Id.* art. IV, para. b.

76. *See id.* art. V ("Persons charged with [apartheid] may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused . . . .").

77. REYDAMS, *supra* note 37, at 59–60.

78. *Id.* The Soviet Union was especially enthusiastic about universal jurisdiction for apartheid, despite its adamant stance against universal jurisdiction in the Genocide Convention. *Id.* at 60.

79. *See, e.g.*, Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, 122 Stat. 3735 (codified in scattered sections of 18 U.S.C.A. (West 2009)) (criminalizing and granting universal jurisdiction for an offense which industrialized Western nations like the United States never commit); *see also* Bassiouni, *supra* note 28, at 50 ("Slavery, like piracy, has greatly diminished in the last two centuries, and that may well have made it possible for states to recognize the application of the theory of universal jurisdiction to what has heretofore been essentially universally condemned.").

prosecute") provisions in international conventions developed.[80] The *aut dedere aut judicare* provision in Article VII of the Convention for the Suppression of Unlawful Seizure of Aircraft states: "The Contracting State in the territory of which an alleged offender is found shall, if it does not extradite him, be obliged without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution."[81] This provision obligates the state party to try alleged offenders found in its territory, unless the state extradites the offender. It remains unclear when this obligation arises: Must the state prosecute in the complete absence of any extradition requests, or only after other states have made extradition requests and been rejected?[82] State practice varies.[83] At the minimum *aut dedere aut judicare* provisions create an obligation to extradite; at the maximum they obligate a state to prosecute an individual in its custody based on universal jurisdiction.[84] The principle of *aut dedere aut judicare* does not support the exercise of unlimited universal jurisdiction, though such treaty provisions usually do not preclude it, either.[85]

While the exercise of universal jurisdiction by national courts has become more common in recent years,[86] conflicting dicta from the International Court of Justice (ICJ) demonstrates that no clear international norm exists regarding universal jurisdiction. A Belgian arrest warrant for the then-Foreign Minister of the Democratic Republic of the Congo, issued based on universal jurisdiction,[87] was appealed to the ICJ.[88] The Congo withdrew its original

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80. REYDAMS, *supra* note 37, at 61.

81. Convention for the Suppression of Unlawful Seizure of Aircraft art. 7, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105. This language is essentially a blueprint for *aut dedere aut judicare* provisions copied almost verbatim in later conventions. REYDAMS, *supra* note 37, at 62. For a list of treaties using substantially similar language, see *id.* at 62 n.104. The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment also substantially repeats this provision. *Id.* at 65. Reydams concludes that this convention too fails to endorse the exercise of universal jurisdiction *in absentia*. *Id.* at 67.

82. REYDAMS, *supra* note 37, at 63.

83. *See id.* ("National implementation practice is inconclusive.").

84. Bassiouni, *supra* note 28, at 55.

85. *See, e.g.*, Convention for the Suppression of Unlawful Seizure of Aircraft art. 4, para. 3, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 ("This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.").

86. *See, e.g.*, *infra* Part II.C.1 (discussing Belgium's brief experiment with universal jurisdiction); *infra* Part II.C.2 (discussing recent Spanish prosecutions under universal jurisdiction).

87. *See infra* notes 105–108 and accompanying text (discussing Belgium's universal jurisdiction legislation).

88. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 32–33 (Feb. 14) (finding that the Belgian arrest warrant "failed to respect the immunity from

challenge to universal jurisdiction and requested that the case be decided only on the grounds of immunity.[89]

Seven judges in the majority and dissent still discussed universal jurisdiction in dicta, with three opposing and four endorsing Belgium's exercise of unlimited universal jurisdiction.[90] In a joint opinion, Judges Higgins, Kooijmans, and Buergenthal addressed unlimited universal jurisdiction and concluded, based upon an examination of international conventions and customs, that no support for the practice exists.[91] However, unlimited universal jurisdiction was not illegal, either; the three judges argued that state practice with regard to it was neutral.[92] Using the logic of the *Lotus* case—that whatever international law does not prohibit states from doing, is permitted—the judges rationalized that, as a neutral state practice, unlimited universal jurisdiction did not violate international law and therefore was acceptable.[93] Perhaps this reasoning was carried to its natural conclusion by Judge Koroma, who simply declared: "Belgium is entitled to invoke its criminal jurisdiction against anyone, save a Foreign Minister [who has immunity]."[94]

On the other side of the debate, President Guillaume and Judges Ranjeva and Rezek disagreed. Judge Ranjeva took issue with the logic of the *Lotus* case, which Belgium espoused in defense of universal jurisdiction; he argued that the *Lotus* majority did not contemplate universal jurisdiction when deciding the case and that the language of *Lotus* should be confined to the facts of that case.[95] Judge Ranjeva concluded that, in the absence of any

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criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of Congo enjoyed under international law" and requiring Belgium to cancel the arrest warrant).

89. *Id.* at 10, 19; *see infra* notes 118–123 and accompanying text (discussing the subsequent history of the case in Belgian courts).

90. REYDAMS, *supra* note 37, at 228–30. These figures omit the two ad hoc judges, Judge Bula Bula and Judge Van den Wyngaert, appointed by each party in order to insure national representation on the court. *See generally Arrest Warrant*, 2002 I.C.J. at 100–36 (separate opinion of Judge *ad hoc* Bula–Bula); *id.* at 137–87 (dissenting opinion of Judge *ad hoc* Van den Wyngaert). *Universal* jurisdiction *in absentia*, the term that the ICJ uniformly used for what this Note refers to as unlimited universal jurisdiction, means essentially the same thing.

91. *Arrest Warrant*, 2002 I.C.J. at 68–76 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal). At that time, "virtually all national legislation" and case law involved some sort of connection to the forum state. *Id.* at 76.

92. *Id.* at 76. *But see* REYDAMS, supra note 37, at 230 (disagreeing with that contention and pointing out that the exercise of unlimited universal jurisdiction usually evokes vigorous protests from the states of the victims' nationality).

93. *Arrest Warrant*, 2002 I.C.J. at 77–80 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

94. *Id.* at 61 (separate opinion of Judge Koroma).

95. *Id.* at 57–58 (declaration of Judge Ranjeva).

connection to a prosecuting state, such a state has no authority to exercise criminal jurisdiction over an absent defendant.[96] President Guillaume also distinguished the *Lotus* case, arguing that the territorial principle of jurisdiction has been strengthened by decolonialization and the U.N. Charter's respect for sovereign equality.[97] President Guillaume found no support for unlimited universal jurisdiction under international law[98] and warned of its potential dangers:

> [A]t no time has it been envisaged that jurisdiction should be conferred upon courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful . . . .[99]

Finally, Judge Rezek challenged Belgium's exercise of universal jurisdiction,[100] stressing that African states refrain from investigating, indicting, and prosecuting European leaders.[101]

As the divided justices in the ICJ indicate, "there is no established practice in which States exercise universal jurisdiction."[102] While other nations have adopted unlimited universal jurisdiction, Belgium itself has retreated from this radical stance.[103] The concept of universal jurisdiction in academic theory is very old, but in legal practice much newer; as an international norm it is still developing.[104]

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96. *Id.* at 58 (declaration of Judge Ranjeva).

97. *Id.* at 43 (separate opinion of President Guillaume).

98. *See id.* at 42 ("[I]nternational law knows only one true case of universal jurisdiction: piracy."); *id.* at 44 ("[I]nternational law does not accept universal jurisdiction; still less does it accept universal jurisdiction *in absentia*.").

99. *Id.* at 43.

100. *See id.* at 92 (separate opinion of Judge Rezek) ("In no way does international law as it now stands allow for activist intervention, whereby a State seeks out on another State's territory . . . an individual accused of crimes under public international law but having *no factual connection with the forum State*.").

101. *Id.* at 93.

102. *Id.* at 76 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

103. *Infra* note 124 and accompanying text.

104. *See* Stephen Macedo, *Introduction* to UNIVERSAL JURISDICTION, *supra* note 28, at 1, 3 ("[U]niversal jurisdiction is not new. It . . . is playing a growing role in the emerging regime of international accountability for serious crimes. The challenge is to define that role and to clarify when and how universal jurisdiction can be exercised responsibly.").

C. Universal Jurisdiction in Action: Case Studies

1. Past and Present Jurisdiction in Belgium

In 1999, Belgium amended its law on genocide and other grave breaches of international law,[105] essentially permitting Belgian courts to exercise universal jurisdiction over these crimes regardless of where they are committed.[106] Under this law, "Belgium enabled itself to hear any case in the world which is suspected of constituting a crime listed in the law, even without the presence of suspects."[107] Combined with the ability of (even foreign) victims to institute a criminal investigation and bypass prosecutorial discretion,[108] Belgium's universal jurisdiction had the potential to target any international figure—and it did.

Investigations under the new law began modestly, with the prosecution of four Rwandan génocidaires who had significant connections to Belgium.[109] One defendant allegedly typeset in Belgium a manifesto inciting the Rwandan genocide,[110] two other defendants had ties to Belgium even before the Rwandan genocide, and all defendants had come to Belgium voluntarily.[111] Also important from a jurisdictional viewpoint was the relative disinterest of Rwanda, the International Criminal Tribunal for Rwanda (ICTR), and the defendants themselves in challenging the jurisdiction of the Belgian prosecution.[112] These convictions were a success for universal jurisdiction, but the nexus to the prosecuting state (which all defendants possessed) means that it was hardly a victory for *unlimited* universal jurisdiction.

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105. *See* Act Concerning the Punishment of Serious Violations of International Humanitarian Law of March 23, 1999 art. 7, Moniteur Belge, *English translation reprinted in* 38 I.L.M. 918, 921–24 (1999) (defining and criminalizing genocide, torture, and other grave breaches of international law).

106. *See id.* art. 1–4, at 921 ("The Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed.").

107. INAZUMI, *supra* note 20, at 93.

108. *See* REYDAMS, *supra* note 37, at 108 (explaining the role of victims in the Belgian legal system).

109. *See generally* Luc Reydams, *Belgium's First Application of Universal Jurisdiction: The* Butare Four *Case*, 1 J. INT'L CRIM. JUST. 428 (2003) (offering background information on the case and insights from the author's personal observation of some of the trial).

110. *Id.* at 430.

111. *Id.* at 434.

112. *Id.* The defendants actually received lighter sentences in Belgium than they would have from the ICTR or Rwandan courts. *Id.* at 435.

Success breeds imitation. Initial achievements under the universal jurisdiction law led to a barrage of complaints and investigations.[113] Palestinian refugees filed a complaint against then-Prime Minister of Israel Ariel Sharon, and Israeli groups responded by going after Palestinian leader Yasser Arafat.[114] Other defendants included Hissène Habré, the former dictator of Chad; Laurent Gbagbo, President of Ivory Coast; Denis Sasson-Nguesso, President of the Congo Republic; Ange-Félix Patassé, former President of the Central African Republic; Fidel Castro, former President of Cuba; Saddam Hussein, former President of Iraq; Hashemi Rafsanji, former President of Iran, and Paul Kagame, President of Rwanda and leader of the Rwandan Patriotic Front (the Tutsi rebel group that defeated the Hutu génocidaires and stopped the Rwandan genocide).[115] Additionally, seven Iraqi victims brought charges of war crimes against George H.W. Bush and Colin Powell for their role in the 1991 Gulf War.[116] These cases typically had no nexus between the defendants and Belgium.[117]

Another defendant in this line of cases was Yerodia Abdoulaye Ndombasi, then-Minster of Foreign Affairs for the Democratic Republic of the Congo.[118] The internationally circulated arrest warrant issued in that case was appealed to the ICJ and found to be illegal.[119] Later, on appeal to the *chambre de mises en accusation* (a pre-trial appeals court), the *Ndonbasi* case[120] was dismissed on the grounds that the defendant was not present in Belgium.[121] The result of the

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113. *See* REYDAMS, *supra* note 37, at 116 ("Victims of human rights violations from all over the world flooded the Belgian authorities with complaints. Hardly a month went by without some international outcast being indicted . . . .").

114. Marlise Simons, *Human Rights Cases Begin to Flood into Belgian Courts*, N.Y. TIMES, Dec. 27, 2001, at A8.

115. *Id.*

116. Stephen Cviic, *Belgium Drops War Crimes Cases*, BBC NEWS, Sept. 24, 2003, http://news.bbc.co.uk/2/hi/europe/3135934.stm (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

117. *See, e.g.*, REYDAMS, *supra* note 37, at 116 (noting the absence of any connection between Belgium and Ndombasi, save for a large Congolese community); *id.* at 117 (noting the absence of any connecting links between Belgium and Ariel Sharon).

118. *Supra* note 88. For a discussion of *Arrest Warrant of 11 April 2000*, see *supra* notes 88–101 and accompanying text.

119. *Id.*

120. Public Prosecutor v. Ndombasi, chambre de mises en accusation of Brussels, Apr. 16, 2002, *available at* http://www.ulb.ac.be/droit/cdi/Site/Legislation_files/Arret%2016%20avril%202002.pdf.

121. *See* REYDAMS, *supra* note 37, at 116 ("The appeals decision in *Public Prosecutor* v *Ndombasi* et al. limits the exercise of universal jurisdiction under the War Crimes Act to cases where the foreign suspect is voluntarily present in Belgium.").

appeal in the *Sharon* case[122] was similar: "The *chambre de mises en accusation* in Brussels (differently composed than in *Ndombasi*) declared the proceedings inadmissible because the defendant was not present" and "opined, moreover, that the exercise of universal jurisdiction *in absentia* is contrary to the Genocide Convention, the Geneva Conventions, . . . and the principle of sovereign equality of States."[123]

After the United States inevitably voiced its opposition to Belgium's politically motivated prosecutions of its officials, Belgium seriously limited the jurisdiction of its courts.[124] Belgian law now requires that the prosecuted crime be committed against a Belgian national or legal resident of Belgium.[125] Unlimited universal jurisdiction thus proved to be a wasted effort for Belgium, drawing fire from both allies abroad and Belgium's own judiciary. Most importantly, however, it failed to produce any convictions in the absence of connecting links. Despite the best intentions behind the Belgian law, justice and accountability could not be achieved by means of unlimited universal jurisdiction.[126]

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122. Abbas Hijazi v. Sharon, chambre de mises en accusation of Brussels, June 26, 2002, *available at* www.ulb.ac.be/droit/cdi/Site/Legislation_files/arret%2026%20juin%202002%20apercu.pdf. The *Sharon* case was then appealed to the Court of Cassation, which did not address the issue of universal jurisdiction. *See* H.S.A. v. S.A., 42 I.L.M. 596, 600 (Cass. 2003) (reversing on grounds of immunity). For a deeper discussion of the *Sharon* case, see generally Antonio Cassesse, *The Belgian Court of Cassation v. The International Court of Justice: The* Sharon and Others *Case*, 1 J. INT'L CRIM. JUST. 437 (2003).

123. REYDAMS, *supra* note 37, at 117.

124. *See Belgium: Universal Jurisdiction Law Repealed*, HUMAN RIGHTS WATCH, July 31, 2003, http://www.hrw.org/en/news/2003/08/01/belgium-universal-jurisdiction-law-repealed (last visited Sept. 29, 2009) (reporting on the disappointed reaction of human rights groups to the repeal of Belgium's universal jurisdiction law) (on file with the Washington and Lee Law Review). The United States threatened to move NATO headquarters out of Belgium if the country's exercise of universal jurisdiction was not curtailed because American military officials like Donald Rumsfeld were unable to go there without fearing arrest. *Id.*

125. *See* Belgium's Amendment to the Law of June 15, 1993 (As Amended by the Law Feb. 10, 1999 and Apr. 23, 2003) Concerning the Punishment of Grave Breaches of Humanitarian Law art. 13, Moniteur Belge, *English translation reprinted in* 42 I.L.M. 1258, 1265–66 (2003) (granting immunity to persons invited to Belgium by the government of an international organization with its headquarters in Belgium); *id.* art. 16, at 1266–67 (limiting jurisdiction to crimes committed against nationals or legal residents of at least three years and tightening criminal investigation and prosecution mechanisms).

126. *See* REYDAMS, *supra* note 37, at 118 ("This situation fuels the criticism that the proceedings *in absentia* against the world's villains are window-dressing.").

2. *Unlimited Universal Jurisdiction in Spain*

Spain currently exercises broader universal jurisdiction than any other country. The Spanish law permitting the exercise of universal jurisdiction has been on the books since 1985, permitting the prosecution of foreign defendants for genocide, terrorism, and other crimes under international law, regardless of where they were committed.[127] Also, under Spanish law, victims and public interest organizations may file complaints which proceed at the discretion of the investigating magistrate, even over the objections of the prosecutor.[128] The combination of unlimited universal jurisdiction and lack of prosecutorial discretion, characteristics that Spain shared with Belgium,[129] predictably led to similar results.[130]

As in Belgium, prosecutions under this statute began by focusing on crimes against Spanish victims. In 1996, members of the Spanish Union of Progressive Prosecutors filed a complaint against members of the Argentine military junta, accusing them of genocide, terrorism, and other crimes against "disappeared" Spanish citizens living in Argentina during its repressive regime.[131] The case was assigned to Judge Baltazar Garzón, who began an investigation into Operation Condor, a conspiracy by South American dictatorships to cooperate in the elimination of their dissidents.[132] During the course of this investigation, Judge Garzón issued over a hundred indictments and warrants for various South American military officers.[133] The first defendant to be arrested and convicted was Adolfo Scilingo, a former Argentine naval officer accused of throwing prisoners out of airplanes, who had voluntarily come to Spain to testify about past abuses committed by the ruling

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127. *See* Ley Orgánica del Poder Judicial [L.O.P.J.] art. 23(4) ("Spanish courts will be equally capable of exercising jurisdiction over crimes [including genocide, terrorism, piracy, and other crimes which Spain has a legal obligation to prosecute] committed by Spanish people or by foreigners outside the national territory . . . .").

128. Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 311 (2001).

129. *See supra* note 106 (authorizing unlimited universal jurisdiction in Belgium); *supra* note 108 and accompanying text (permitting foreign victims to file complaints in Belgium).

130. *Compare supra* notes 114–116 and accompanying text (listing fruitless complaints and indictments in Belgium), *with infra* notes 139, 164, 166 and accompanying text (describing the same outcome for investigations and extradition attempts in Spain).

131. Roht-Arriaza, *supra* note 128, at 311.

132. *Id.* at 312.

133. *Id.*

junta.[134] A second defendant, Ricardo Cavillo, was extradited to Spain from Mexico to stand trial for atrocities committed against Spanish nationals.[135]

One of the warrants Judge Garzón issued was for General Augusto Pinochet, the former dictator of Chile, accusing him of genocide, terrorism, and torture.[136] Pinochet was arrested in England, and the outcome of three hearings by the House of Lords allowed him to be extradited.[137] Rather than going to Spain, however, he was determined to be medically unfit to stand trial and returned to Chile.[138] Pinochet never stood trial for his crimes.[139]

Despite this failure to secure a conviction, the *Pinochet* case is regarded as a landmark case.[140] It represents the first time a head of state was (almost) held accountable for abuses committed during his regime.[141] For a variety of reasons, however, it is immaterial to an analysis of universal jurisdiction. At the core of its complaint, Spain was asserting passive personality jurisdiction over Pinochet on behalf of Spanish victims of his rule.[142] The House of Lords relied upon national, not international, law to find jurisdiction,[143] and the Spanish legal decisions surrounding the charges against Pinochet have since been superseded by developments in the later Guatemalan cases.[144] The

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134. *'Dirty War' Officer Found Guilty*, BBC NEWS, Apr. 19, 2005, http://news.bbc.co.uk/2/hi/europe/4460871.stm (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

135. *Cavillo in Spain to Stand Trial*, CNN NEWS, June 29, 2003, http://www.cnn.com/2003/WORLD/americas/06/28/cavallo.mexico (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

136. Richard A. Falk, *Assessing the Pinochet Litigation: Whither Universal Jurisdiction?*, *in* UNIVERSAL JURISDICTION, *supra* note 28, at 97, 106–07.

137. *See id.* at 110–18 (discussing in detail the three phases of the Pinochet extradition request). The British decisions relied upon domestic implementation legislation of the Torture Convention rather than customary norms of international law. Roht-Arriaza, *supra* note 128, at 314.

138. *Pinochet Escapes Torture Trial Charges*, BBC NEWS, Mar. 2, 2000, http://news.bbc.co.uk/onthisday/hi/dates/stories/march/2/newsid_2771000/2771229.stm (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

139. *Id.*

140. *See* Falk, *supra* note 136, at 97 ("Typical of the comments on this legal pursuit of Pinochet were the following: 'pathbreaking,' 'breathtaking,' 'a decision without precedent . . . [a] beginning for what can and should be justice without borders,' and a course of litigation that has 'already revolutionized international law.'").

141. *Id.* at 119.

142. Roht-Arriaza, *supra* note 128, at 314.

143. *Id.*

144. For a discussion of the November 5, 1998 decision of the Spanish National Court upholding jurisdiction over the Chilean and Argentine defendants, see *id.* at 313.

Pinochet case did, however, provide a precedent for Spain's subsequent transnational prosecutions.

In December 1999, Nobel Peace Prize winner Rigoberta Menchú filed a complaint in Spain alleging the commission of genocide, torture, and other crimes during the thirty years of civil war in Guatemala.[145] During this internecine conflict, which claimed over 200,000 lives, the Spanish embassy had been firebombed and four Spanish priests disappeared or were killed.[146] The complaint included these crimes connected to Spain but focused mainly on the genocide allegedly committed against Guatemala's indigenous Mayan population.[147] A judicial investigation into the complaint began, but the Public Prosecutor's Office challenged the judge's jurisdiction and the National Court ruled that Spanish courts had no jurisdiction.[148]

The matter was appealed to Spain's Supreme Court, which upheld the lower court's ruling.[149] The Supreme Court rejected the argument that the Genocide Convention established the exercise of universal jurisdiction;[150] other international treaties containing *aut dedere aut judicare* provisions also fail to provide for universal jurisdiction.[151] The opinion required that the unlimited universal jurisdiction that domestic Spanish law authorizes be exercised in accordance with international law,[152] and international law opposes the idea that any "State may unilaterally establish order through criminal law, against everyone and the entire world, without there being some point of connection which legitimatizes the extraterritorial extension of its jurisdiction."[153] The Supreme Court repeatedly emphasized "the relevance of a legitimizing link to national interest, within the framework of universal jurisdiction" as the justification for denying jurisdiction over charges of genocide committed against Guatemala's Mayans.[154] It also upheld jurisdiction for the charges

145. Roht-Arriaza, *supra* note 15, at 84.

146. *Id.* at 83.

147. *Id.* at 84

148. *Id.* at 85.

149. *See* Sentencia Tribunal Supremo [STS], Feb. 25, 2003, *translated in* 42 I.L.M. 686, 702–03 (2003) (deciding that Spanish courts had no jurisdiction to hear charges of genocide against members of the Guatemalan government).

150. *See id.* at 695 ("The [Genocide] Convention does not establish universal jurisdiction, nor does it exclude it.").

151. *See id.* at 699–701 (examining jurisdiction under several multilateral treaties to which Spain is a party).

152. *See id.* at 697 ("As a general rule, the foresight of Spanish law must make itself compatible with the requirements derived from international law . . . .").

153. *Id.* at 698.

154. *Id.* at 701.

regarding the firebombing of the Spanish embassy and the deaths of the Spanish priests, based upon passive personality jurisdiction.[155]

The case then went before the highest court in Spain, the Constitutional Court, which reversed the Supreme Court's ruling.[156] The Constitutional Court rejected the lower court's conception of connecting links for too narrowly focusing on the nationality of the victims, the location of the defendants, and Spain's national interest in the investigation, when genocide is an international crime "transcend[ing] the particular victims and reach[ing] the international community as a whole."[157] A broad scope for universal jurisdiction, it felt, was necessary to give full effect to the noble aspirations for which the doctrine was designed.[158]

With jurisdiction established, the next step in bringing the Guatemalan defendants to justice was to gather evidence and extradite the accused. In July 2006, a Spanish judge issued six warrants for the arrest of former high-ranking Guatemalan officials, and, in November 2006, a Guatemalan trial court executed four of the warrants.[159] The defendants filed legal challenges, and, in December 2007, Guatemala's Constitutional Court held that the extradition requests based upon universal jurisdiction violated Guatemala's sovereignty.[160] The response to this decision and the subsequent release of the defendants was predictably negative from human rights quarters,[161] but more unusual was the reaction of the Spanish judge on the case, who issued a written response to Guatemala's Constitutional Court.[162] The opinion lambasted the Guatemalan judiciary for failing to fulfill their international obligations and vowed to continue on even without Guatemalan support.[163] To achieve this end, the

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155. *Id.* at 702.

156. *See* Sentencia Tribunal Constitucional Sisteinatizadas y Comentadas [STC], Sept. 26, 2005, at 27, *translation available at* http://www.cja.org/cases/Guatemala_Docs/scc_jurisdiction_english.pdf at 27 (holding that Spanish jurisdiction did exist over the charges of genocide).

157. *Id.* at 26.

158. *Id.*

159. Roht-Arriaza, *supra* note 15, at 87.

160. *Id.* at 80.

161. For a discussion of the verdict from a human rights standpoint, see Martha Fanesca, *Guatemala: Constitutional Court Verdict Exemplifies Impunity*, UPSIDE DOWN WORLD, Jan. 23, 2008, http://upsidedownworld.org/main/content/view/1097/33 (last visited Sept. 29, 2009) ("Legal experts confirm that the verdict contains arbitrary legal jargon that is not based on the law.") (on file with the Washington and Lee Law Review).

162. *See generally* D. Santiago J. Pedraz Gómez, Spanish National Court Response to the Guatemalan Constitutional Court, Jan. 16, 2008, *translation available at* http://www.cja.org/cases/Guatemala_Docs/response_to_guate_decision_english.pdf (criticizing the decision of Guatemala's Constitutional Court).

163. *Id.* at 5–6.

judge called upon Guatemalan, Mexican, Belizean, Honduran, Nicaraguan, El Salvadoran, and American media outlets to broadcast an announcement for witnesses to the Mayan genocide to come forward and provide evidence.[164] No trials have resulted yet from the Guatemala investigation.

Spain also seems to be the forum of choice for investigations against Chinese officials for atrocities committed in Tibet. In January 2006, the Spanish National Court began investigation into acts of genocide committed in Tibet and later added charges for offenses committed against members of the Falun Gong.[165] Given Spain's ban on trials in absentia and the unlikely possibility that China will extradite its former head-of-state, "a trial is virtually excluded."[166]

More recently, Spain's Congress of Deputies voted almost unanimously to limit the exercise of universal jurisdiction only to defendants present in Spain.[167] The measure still must pass the Senate and will only apply prospectively, permitting investigations in current cases to continue.[168] Spain may also amend its universal jurisdiction legislation in order to prevent it from being used against Israel.[169] While Spain is not the only country with unlimited jurisdiction,[170] it is the doctrine's most fervent practitioner, and these reversals demonstrate the political impracticability of unlimited universal jurisdiction.[171]

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164. *Id.* at 6–7.

165. *See* Christine A.E. Bakker, *Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can It Work?*, 4 J. INT'L CRIM. JUST. 595, 595, 601 n.21 (2006) (recounting early attempts to hold Chinese officials accountable for genocide in Tibet).

166. *Id.* at 601.

167. Andrew Morgan, *Spain Lower House Votes to Limit Reach of Universal Jurisdiction Statute*, JURIST, June. 25, 2009, http://jurist.law.pitt.edu/paperchase/2009/06/spain-lower-house-votes-to-limit-reach.php (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

168. *Id.*

169. Barak Ravide, *Spanish FM: We'll Act to Prevent War Crimes Probes Against Israel*, HAARETZ SERVICE, Jan. 1, 2009, http://www.haaretz.com/hasen/spages/1059964.html (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

170. *See, e.g.*, REYDAMS, *supra* note 37, at 142–45 (discussing Germany's new Code of Crimes Against International Law (*Völkerstrafgesetzbuch*), which overrides a judicially imposed requirement of connecting links and mandates unlimited universal jurisdiction). For a discussion of the most significant case brought under universal jurisdiction in Germany, see Scott Lyons, *German Criminal Complaint Against Donald Rumsfeld and Others*, ASIL INSIGHTS, Dec. 14, 2006, http://www.asil.org/insights061214.cfm (last visited Sept. 29, 2009) (discussing Germany's use of universal jurisdiction to investigate allegations of torture committed by Americans at Guantanamo and Abu Ghraib) (on file with the Washington and Lee Law Review). Due to its popularity among human rights advocates, unlimited jurisdiction has survived several challenges and may yet do so again.

171. *But see* Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 589, 595 (2003) (sounding prematurely

3. Universal Jurisdiction in the United States of America

By the early nineteenth century, universal jurisdiction in the United States was well established for piracy. For example, in *United States v. Klintock*[172] the Attorney General argued: "A pirate, being *hosti humani generis*, is of no nation or state. . . . All the States of the world are engaged in a tacit alliance against them. An offence committed by them against any individual nation, is an offence against all. It is punishable in the Courts of all."[173] Chief Justice Marshall declared that pirates "are proper objects for the penal code of all nations."[174] Distinguishing between pirates "acting in defiance of all law" and privateers acting "under the acknowledged authority of a foreign State,"[175] the *Klintock* Court believed Congress should exercise universal jurisdiction over "offenses committed against all nations, including the United States, by persons who by common consent are equally amenable to the laws of all nations."[176]

The United States has been slower to embrace more modern grounds for universal jurisdiction.[177] The Third Restatement of American Foreign Relations Law expressly recognized universal jurisdiction,[178] but the Restatement did not yet reflect the actual law of the United States.[179] In the 1990s, several hijacking cases relied upon a combination of universal jurisdiction and passive personality to exercise jurisdiction over the

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"the death knell for *absolute* universal jurisdiction (which one could also term 'universality unbound' or 'wild exercise of extraterritorial judicial authority')" after the Spanish Supreme Court's decision).

172. *See* United States v. Klintock, 18 U.S. (5 Wheat.) 144, 153 (1820) (holding that an act of Congress granting federal jurisdiction to specific acts constituting piracy "does extend to all persons on board all vessels which throw off their national character by cruizing [*sic*] piratically and committing piracy on other vessels").

173. *Id.* at 147–48.

174. *Id.* at 152.

175. *Id.*

176. *Id.*

177. *See* INAZUMI, *supra* note 20, at 77–78 (discussing America's lack of speed in passing domestic legislation authorizing universal jurisdiction over modern violations of international law).

178. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, . . . hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where [no territorial, nationality, or protective jurisdiction] is present.").

179. *See* INAZUMI, *supra* note 20, at 77 ("Although the Third Restatement published in 1987 explicitly acknowledged universal jurisdiction over genocide and other crimes, the actual domestic legislation in the United States did not lay down such broad jurisdiction in the 1980s.").

defendants.[180] After becoming a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United States extended jurisdiction for the crime of torture to cover extraterritorial commissions regardless of the nationality of the offender or victim, as long as "the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender."[181] Also notable is the Maritime Drug Law Enforcement Act (MDLEA),[182] which permits the exercise of American police power and jurisdiction over foreign nationals aboard foreign vessels in international waters.[183]

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180. *See* United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (affirming the district court's exercise of passive personality and universal jurisdiction over a hijacker) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 404, 423 (1987)); United States v. Yousef, 927 F. Supp. 673, 679–83 (S.D.N.Y. 1996) (exercising territorial jurisdiction over charges of a conspiracy to simultaneously bomb eleven American passenger planes operating out of the Philippines and universal jurisdiction over a death and injuries caused as part of that conspiracy "since the crimes charged have a 'substantial, direct and foreseeable' effect in the United States"). The *Yousef* court dismissed the defendants' arguments against universal jurisdiction, finding that "[a]ny constitutionally required nexus to the United States is clearly present." *Id.* at 682.

181. 18 U.S.C. § 2340A(b)(2) (2006).

182. *See* 46 U.S.C. § 70503 (2006) (criminalizing possession "with intent to manufacture or distribute, a controlled substance on board . . . a vessel subject to the jurisdiction of the United States"); *id.* § 70504 ("Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge."); *id.* § 70505 (denying standing to individuals raising failure to comply with international law as a defense).

183. *See generally* Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. (forthcoming 2009) (examining the constitutionality under Article I of universal jurisdiction exercised under the Maritime Drug Law Enforcement Act without any nexus to the United States). Defendants under the MDLEA often raise due process challenges when their prosecuted behavior has no connection to the United States; a circuit split over this issue has developed, with the Ninth Circuit alone requiring some connecting link in order to satisfy due process. *Compare* United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999) ("[D]ue process does not require the government to prove a nexus between a defendant's criminal conduct and the United States in a prosecution under the MDLEA when the flag nation has consented to the application of United States law to the defendants."), *and* United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) (finding congressional intent to override international law to the extent that a connecting link to the prosecuting state might be required, and rejecting due process arguments on the grounds that drug trafficking is "condemned universally by law-abiding nations"), *with* United States v. Klimavicius-Viloria, 144 F.3d 1249, 1255 (9th Cir. 1998) ("Before a United States court may entertain a prosecution for violation of the Act, there must be a sufficient nexus between the defendant and the United States so that such application would not be arbitrary or fundamentally unfair.") (citations omitted). Insofar as the defendant's state of nationality almost always consents to the exercise of American jurisdiction, Kontorovich, *supra*, manuscript at 12, this exercise of jurisdiction can be distinguished from the others discussed in this Note as *sui generis*.

A recent spate of lawmaking under the Bush Administration further extended the reach of universal jurisdiction in the United States. The Genocide Accountability Act of 2007[184] extended the jurisdictional elements of genocide to be met when, "after the conduct required for the offense occurs, the alleged offender is brought into, or found in, the United States, even if that conduct occurred outside the United States."[185] Individuals found in the United States may also be prosecuted for using child soldiers under the Child Soldier Accountability Act of 2008.[186]

The latest development in American universal jurisdiction jurisprudence occurred in October 2008, when Charles "Chuckie" Taylor Jr., the son of former Liberian president Charles Taylor, was convicted of torture by a federal court in Miami—the first prosecution under § 2340A.[187] On January 9, 2009, Chuckie Taylor was sentenced to ninety-seven years in prison.[188] As a dual citizen of Liberia and the United States, the *Taylor* trial was not based upon universal jurisdiction, but it did lead to a discussion of the constitutionality of that doctrine.[189]

Taylor's defense challenged the constitutionality of 18 U.S.C. § 2340A, claiming that it attempted "to oversee, through the open-ended terms of federal criminal law—the internal and wholly domestic actions of a foreign government."[190] The defense began its assault on the statute by questioning the

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184. *See* Genocide Accountability Act of 2007, Pub. L. No. 110-151, 121 Stat. 1821 (codified at 18 U.S.C.A. § 1091 (West 2009)) (defining genocide, the punishment for genocide, and the required circumstances for the offense).

185. 18 U.S.C.A. § 1091(d)(5) (West 2009).

186. *See* Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, 122 Stat. 3735 (codified in scattered sections of 18 U.S.C.A. (West 2009)) (granting jurisdiction for the recruitment or use of child soldiers regardless of nationality for a defendant present in the United States).

187. *See* Yolanne Almanzar, *Son of Ex-President of Liberia Is Convicted of Torture*, N.Y. TIMES, Oct. 30, 2008, at A16 (reporting on the trial of Chuckie Taylor). For a fascinating biography of Chuckie Taylor, see generally Johnny Dwyer, *American Warlord*, ROLLING STONE, Sept. 18, 2008, at 86, *available at* http://www.rollingstone.com/news/story/22828415/american_warlord.

188. *Taylor's Son Jailed for 97 Years*, BBC NEWS, Jan. 9, 2009, http://news.bbc.co.uk/2/hi/americas/7820069.stm (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

189. *See* Elise Keppler et al., *First Prosecution in the United States for Torture Committed Abroad: The Trial of Charles 'Chuckie' Taylor, Jr.*, 15 No. 3 WASH. C. L. HUM. RTS. BRIEF 18, 20 (2008), *available at* http://www.wcl.american.edu/hrbrief/15/3keppler.pdf ("In rejecting the defense's arguments, the court nevertheless based some of its reasoning on the fact that the defendant is a U.S. citizen. Accordingly, a future constitutional challenge to the statute may yet raise issues of first impression if a noncitizen is facing prosecution.").

190. Defendant's Motion to Dismiss the Indictment, and Memorandum of Law in Support Thereof, Based on the Unconstitutionality of 18 U.S.C. § 2340A, Both on Its Face and As

power of Congress to legislate over torture committed in Liberia under the Commerce Clause or the Define and Punish Clause.[191] Taylor also objected to the vague language of the statute[192] and, presumably, universal jurisdiction.[193] Taylor's best argument may have been that there is a presumption against extraterritoriality when construing statutes, and the charges of carrying and using a firearm in commission of the federal crime (extraterritorial torture) should be dropped.[194]

Judge Altovar rejected the defendant's arguments in their entirety.[195] The court found that Congress had the power to enact § 2340A through the Necessary and Proper Clause, or alternately, the Define and Punish Clause.[196] The *Taylor* case thus creates a strong precedent for the constitutionality of American exercises of universal jurisdiction and the authority of Congress to criminalize extraterritorial violations of international law.[197] This conviction also strongly suggests that, in the future, the United States will no longer be "a

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Applied to the Allegations of the Indictment, at 1, United States v. Emmanuel, No. 06-20758-CR, 2007 WL 2002452 (S.D. Fla. July 5, 2007) [hereinafter Defendant's Motion], *available at* 2007 WL 980550.

191. *Id.* at 2–8.

192. *See id.* at 19 ("The statute simply does not provide a defendant in this situation with sufficient guidance . . . , creating an irresolvable dilemma for a foreign government officer in trying to determine a myriad of differing views, among hundreds of nations and cultures, as to what is an inappropriate level of suffering.").

193. *See id.* at 10 ("Nor does the universality principle of jurisdiction warrant extraterritorial application of the instant statute. Here, there was a clear locus of the offense *and* harm—Liberia—and no harm, no matter how broadly that is defined, is even remotely connected to the United States."). This passage, the only mention of universal jurisdiction per se within the motion to dismiss, actually sounds more like an articulation of the effects doctrine. *See supra* note 22 and accompanying text (explaining the effects doctrine of territorial jurisdiction).

194. Defendant's Motion, *supra* note 190, at 10–12. Universal jurisdiction does not exist (or at least it did not exist until now) for such an offense.

195. United States v. Emmanuel, No. 06-20758-CR, 2007 WL 2002452, at *18 (S.D. Fla. July 5, 2007).

196. *Id.* at *9. The court found that the Necessary and Proper Clause would allow Congress to pass implementing legislation for the Torture Convention, while the Define and Punish Clause (which gives Congress the power to "define and punish Piracies and Felonies on the high seas, and Offences against the Law of Nations," U.S. CONST. art. I, § 8, cl. 10) would permit Congress to pass legislation punishing violations of international law committed outside the United States. *Id.* at *18.

197. *Accord* Brief *Amici Curiae* Submitted by International Human Rights Organizations Opposing Defendant's Motion to Dismiss the Indictment at 1–3, United States v. Emmanuel, No. 06-20758-CR, 2007 WL 2002452 (S.D. Fla. Mar. 2, 2007), *available at* 2007 WL 1301622 (citing the Define and Punish Clause, the principle of *aut dedere aut judicare*, and international law as support for a finding of constitutionality).

hideout for these hideous henchmen who have been involved in war crimes around the world."[198]

III. Civil Liability and Jurisdiction

"[U]niversal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well."[199] This Note uses the Alien Tort Statute (ATS)[200] of the United States as the model for the expansive civil jurisdiction which should accompany criminal jurisdiction in order to provide the fullest redress to victims of atrocities. Other methods of remedy exist, such as the *partie civile* system[201] and the Trust Fund for Victims at the International Criminal Court,[202] but this discussion focuses on the ATS because, unlike the previously mentioned options, a civil suit in a common law system can succeed even when a criminal trial is impossible.

A. Jurisdiction for Civil Liability in the United States: The Alien Tort Statute

The ATS creates remarkably expansive civil jurisdiction for violations of international law. The statute declares: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[203] The requirements of the ATS are thus rather simple: "(1) an alien sues (2) for a tort (3) committed

198. *No Safe Haven: Accountability for Human Rights Violators in the United States: Hearing Before the Subcomm. on Human Rights and the Law*, 110th Cong. 2 (2007) (statement of Sen. Richard J. Durbin).

199. Sosa v. Alvarez-Machain, 542 U.S. 692, 763 (2004) (Breyer, J., concurring).

200. *See* Alien Tort Statute (ATS), 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). The ATS is also known as the Alien Tort Claims Act.

201. *See* Jeremy Sarkin, *Reparations for Gross Human Rights Violations As an Outcome of Criminal Versus Civil Court Proceedings*, *in* OUT OF THE ASHES: REPARATIONS FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS 151, 171–73 (K. De Feyter et al. eds., 2005) (describing the *partie civile* system, in which victims join a civil suit to a pending criminal case and act as co-prosecutors in order to receive reparations).

202. *See* Pablo de Grieff & Marieke Wierda, *The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints*, *in* OUT OF THE ASHES, *supra* note 201, at 225, 225–43 (describing the International Criminal Court's method of providing victims with reparations).

203. ATS, 28 U.S.C. § 1350 (2000).

in violation of the law of nations (i.e., international law)."[204] Part II.A.1 traces the historical development of the ATS, while Part II.A.2 examines jurisdiction under the ATS.

1. The Development of the Alien Tort Statute

There is "a poverty of drafting history" on the ATS, enacted as part of the Federal Judiciary Act of 1789, and "a consensus understanding of what Congress intended has proven elusive."[205] Early cases discussing the ATS were content to use it as the basis of jurisdiction for causes of action alleging violations of international law.[206] Until the 1980s, the potentially revolutionary statute lay dormant.[207]

Filartiga v. Pena-Irala[208] was the first modern case to apply the ATS to violations of international norms.[209] Examining the language of the Alien Tort

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204. Kadic v. Karadžić, 70 F.3d 232, 238 (2d Cir. 1995).

205. Sosa v. Alvarez-Machain, 542 U.S. 692, 718–19 (2004) (majority opinion).

206. *See, e.g.*, Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1607) (relying on the ATS for jurisdiction in a suit involving mortgaged slaves captured by a French privateer); Moxon v. The Fanny, 17 F. Cas. 942, 948 (D. Pa. 1793) (No. 9895) (implying that the ATS would provide jurisdiction for the violation of an American treaty if the suit was for a tort only and not for the return of property).

207. *See Sosa*, 542 U.S. at 712 ("[F]or over 170 years after its enactment [the ATS] provided jurisdiction in only one case.").

208. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (holding that torture violates "universally accepted norms of the international law of human rights" and thus federal jurisdiction exists for suits against torturers under the ATS). The Filartiga family brought a suit against Pena-Irala, an Inspector General of Police in Paraguay, alleging that he tortured and murdered their son because of the family's opposition to the Paraguayan regime in power at the time. *Id.* The district court dismissed the case for lack of jurisdiction, but the Second Circuit Court of Appeals reversed, finding that 28 U.S.C. § 1350 granted jurisdiction. *Id.* at 880, 889. The *Filartiga* Court examined international law and concluded that an international norm against torture existed. *Id.* at 881–84. Thus, the plaintiff's claim was "undeniably an action by an alien, for a tort only, committed in violation of the law of nations" receiving federal jurisdiction under the ATS. *Id.* at 887.

209. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 161 (2d ed. 2005). An earlier, extremely interesting child custody suit between aliens had used § 1350 for the basis of jurisdiction in 1961, with the concealment of the child's name on a passport providing the necessary violation of the law of nations. *See* Adra v. Clift, 195 F. Supp. 857, 862–63, 866–67 (D. Md. 1961) (finding that a child custody dispute constitutes a tort under the ATS, ignoring the preclusive effect of a judgment from the Religious Court of Beirut, applying the equitable best-interests-of-the-child standard, instead of Lebanese law, and tersely awarding custody to the mother in America). While citing *Adra* as precedent, *Filartiga*'s analysis of the sources of international law is far more cosmopolitan. *See Filartiga*, 630 F.2d at 887 n.21 (citing *Adra* and Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607), as rare instances when § 1350 was used as a basis for jurisdiction). *Compare id.* at 880–85 (following the comprehensive approach

Statute, the *Filartiga* court reasoned that the statute does not grant new rights to aliens, but simply allows the federal courts to adjudicate existing rights recognized under international law.[210] The *Filartiga* court distinguished between behavior that is universally condemned, such as theft or fraud,[211] and that which truly rises to the level of a violation of the law of nations.[212] Importantly, the act of state doctrine was rejected in dictum as a defense for the defendant's actions, depriving him of the ability to hide behind the protective cloak of state authority.[213] The *Filartiga* court concluded that "for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."[214]

The landmark holding of *Filartiga* marked the beginning of a wave of litigation under the ATS in federal courts, including class action suits.[215] Notably, a class action against Ferdinand Marcos, the former dictator of the Philippines, produced a jury verdict of over $750 million in compensatory damages and $1.2 billion in punitive damages.[216] And with the passage of

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to interpreting international norms and custom advocated by *The Paquete Habana*, 175 U.S. 677 (1900), and Article 38 of the International Court of Justice; examining the United Nations Charter, General Assembly resolutions, international conventions, and foreign judicial opinions to hold that torture violates international law), *with Adra*, 195 F. Supp. at 863–65 (examining treatises to distinguish between the law of nations and private international law, but only using American and Lebanese law—and only citing American cases—to conclude that falsifying a passport is a violation of the law of nations).

210. Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

211. *See id.* at 888 ("[O]nly where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute."). The *Filartiga* court referred to precedent which "noted that the mere fact that every nation's municipal law may prohibit theft does not incorporate 'the Eighth Commandment, "Thou shalt not steal" . . . [into] the law of nations.'" *Id.* (citing IIT v. Vencap, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.)).

212. *See id.* at 888–89 ("Here, the nations have made it their business, both through international accords and unilateral action, to be concerned with domestic human rights violations of this magnitude.").

213. *See id.* at 889 ("[W]e doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly ungratified by that nation's government, could properly be characterized as an act of state.").

214. *Id.* at 890. The opinion went on to prophesy: "Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence." *Id.*

215. *See* SHELTON, *supra* note 209, at 163–71 (summarizing the cases under the ATS following the landmark *Filartiga* decision).

216. Hilao v. Estate of Marcos, 103 F.3d 789, 791 (9th Cir. 1996). Four hundred fifty million dollars of the estate's assets were hidden in Swiss banks, but the Swiss Federal Court ordered the release of the funds to the Philippine Government for the purpose of compensating victims, who have yet to see any money. For a complete discussion of the litigation and

the Torture Victim Protection Act (TVPA),[217] Congress expressed its approval of *Filartiga*.[218] The TVPA codified the holding of *Filartiga*, authorizing civil suits against aliens who commit torture or extrajudicial killings.[219]

In *Sosa v. Alvarez-Machain*,[220] the United States Supreme Court considered the ATS for the first time.[221] A majority reaffirmed *Filartiga*'s interpretation of the ATS, while clarifying and limiting the scope of jurisdiction under § 1350.[222] The Court rejected the argument that the ATS created "a new cause of action for torts in violation of international law," instead finding the statute to be strictly jurisdictional.[223] Examining the background in which the ATS was passed, the Court concluded that the statute was meant to "furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations."[224] Because the ATS was "intended to have practical effect the moment it became law,"[225] it is "best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[226] When Congress passed the ATS, three violations of the law of nations could be considered torts: infringements of the rights of ambassadors, violations of safe conducts, and piracy.[227] Both the common law and international law have developed since that time, and the Court found nothing to preclude federal courts from recognizing new violations of the law of nations as

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subsequent attempts to enforce the judgment, see ILARIA BOTTIGLIERO, REDRESS FOR VICTIMS OF CRIMES UNDER INTERNATIONAL LAW 58–61 (2004).

217. Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C § 1350 note (2000)).

218. *See* S. REP. NO. 102-249, at 3 (1991) (citing *Filartiga* with approval). The Senate Report also quotes some of the *Filartiga* decision's more aspirational language, discussed *supra* note 214 and accompanying text. *Id.*

219. *See id.* ("The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law [28 U.S.C. § 1350] . . . .").

220. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004) (holding that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy").

221. SHELTON, *supra* note 209, at 161.

222. *Id.*

223. *Sosa*, 542 U.S. at 713.

224. *Id.* at 720.

225. *Id.* at 724.

226. *Id.*

227. *Id.*

common law torts.[228] However, the majority urged caution[229] and required that new causes of action permitted by federal courts not have "less definite content and acceptance among civilized nations" than the three original torts envisioned by Congress.[230] Thus, violations of international law such as genocide, war crimes, crimes against humanity, and torture—crimes for which universal jurisdiction is typically exercised—are causes of action under the ATS.[231]

2. Jurisdiction Under the Alien Tort Statute

For jurisdiction under § 1350, the location where the tort was committed and the nationality of the defendant are irrelevant.[232] If the plaintiffs meet the requirements of the statute, the only connecting links necessary between the defendant and the United States are the minimum contacts required for the exercise of personal jurisdiction by federal courts.[233] Because the Supreme Court has found that personal presence within a jurisdiction satisfies these minimum contacts,[234] proper service of process on a defendant within the territory of the United States is the only connection to the judicial forum that the ATS requires.[235] This transient or "tag" jurisdiction is a key difference from the jurisdictional regimes of the European Union,[236] where, "[u]nder the

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228. *Id.* at 724–25.

229. *See id.* at 725–28 (offering reasons for judicial caution in dealing with international law and the common law).

230. *Id.* at 732.

231. *See also id.* at 732 n.20 (discussing whether private actors may also be sued for these violations of international law). The Court concluded that private liability extended to crimes for which a sufficient consensus on liability existed. *Id.*

232. *Supra* note 204 and accompanying text.

233. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that . . . the suit does not offend 'traditional notions of fair play and substantial justice.'").

234. *See* Burnham v. Superior Court, 495 U.S. 604, 621 (1990) (plurality opinion) ("*International Shoe* confined its 'minimum contacts' requirement to situations in which the defendant 'be not present within the territory of the forum,' and nothing . . . expands that requirement beyond that."); *see also* Grace v. MacArthur, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (finding passengers on a plane flying over the court's jurisdiction to be present within the territorial limits of that jurisdiction and thus amenable to service under the Federal Rules of Civil Procedure).

235. *See* Kadic v. Karadžić, 70 F.3d 232, 247 (2d Cir. 1995) (affirming personal service of process over an ATS defendant within the territory of the United States).

236. HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 148

Brussels Convention, transient jurisdiction over another EU domiciliary based solely on territorial service of process would be deemed 'exorbitant'" and thus disallowed.[237] Because transient jurisdiction is permissible, the United States may ironically have broader civil jurisdiction than either Spain or Belgium.[238]

But what if the defendant is not physically present within the land, airspace, or territorial waters of the United States? Personal jurisdiction might still be possible. American citizens are always subject to the personal jurisdiction of the United States, even if they are not within the country.[239] If a defendant has assets in the United States—ill-gotten gains originally procured by violating international law[240]—an American court would almost certainly have jurisdiction for proceedings against that property.[241] The ATS could thus be used to imperil the finances of international criminals even when they are not within American borders. For the *hostis humanis generis*, the United States would be neither a safe haven nor a lucrative place to invest.

If the defendant's assets in the United States are not (verifiably) derived from his victims, jurisdiction could still be possible if the defendant has "purposefully established minimum contacts within the forum state" and "the assertion of personal jurisdiction would comport with fair play and justice."[242] Even defendants who are outside the United States may be subject to personal

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(2008).

237. *Id.* at 149. Article 3 of the Convention explicitly overrides the Danish and British jurisdictional rules which permit transient jurisdiction. *Id.*

238. *See id.* at 148–49 (delineating the differences between American and European Union law on transient jurisdiction).

239. *See* Blackmer v. United States, 284 U.S. 421, 438 (1932) ("The jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction in personam . . . .").

240. *Cf.* CrimC (Jer) 40/61 Attorney General of Israel v. Eichmann (*Eichmann I*), 36 I.L.R. 18, 166–67 (1961) (recording the property plundered from Jewish victims in the Holocaust). *But see* Moxon v. The Fanny, 17 F. Cas. 942, 948 (D. Pa. 1793) (No. 9895) (implying that the ATS would provide jurisdiction for the violation of an American treaty if the suit was for a tort only and not for the return of property). If the property was not taken in association with genocide, war crimes, or some other clearly defined violation of international law (like piracy or perhaps brigandage), then federal courts would not have jurisdiction over the case under the ATS; recourse could still be had to state courts of general jurisdiction (if the state long-arm statute permitted) or federal courts if some other jurisdictional basis could be found.

241. *See* Shaffer v. Heitner, 433 U.S. 186, 207 (1977) ("[W]hen claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction.") (citations omitted).

242. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (citations omitted). A complex body of law has grown around exactly what "minimum contacts" and "fair play and justice" mean. This Note only attempts to comprise the specific issue of jurisdiction under the ATS, without addressing these broader jurisdictional issues.

jurisdiction when "the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[243] When a defendant's minimum contacts with individual states are insufficient to permit personal jurisdiction, then as a last resort Rule 4(k)(2) of the Federal Rules of Civil Procedure applies:

> For a claim that *arises under federal law*, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) The defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and law.[244]

Rule 4(k)(2) essentially permits suits under the ATS against defendants who have minimum contacts with the United States as a whole (but no minimum contacts with any specific state).[245] The national contacts test for civil jurisdiction which the ATS enjoys is the broadest civil jurisdiction standard possible in the United States, albeit one that only applies when personal jurisdiction is lacking in every individual state.[246] The minimal due process concerns of civil jurisdiction stand in stark contrast to unlimited universal jurisdiction over criminal defendants; the disparity of having higher standards of due process for defendants in civil suits than in criminal trials is further analyzed in Part IV.A.1.

IV. Discussion

This Note has discussed the actual practice of states with regard to criminal and civil jurisdiction; the discussion now shifts to the defects that result from unlimited universal jurisdiction. Part IV.A addresses theoretical and empirical issues stemming from the exercise of universal jurisdiction when there is a lack of connecting links. In Part IV.B, this Note proposes solutions

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243. Hanson v. Denckla, 357 U.S. 235, 253 (1958) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)); *see also* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) ("[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.").

244. FED. R. CIV. P. 4(k)(2) (emphasis added). "Arising under international law" is broad language which "includes all claims that 'arise' in one way or another under federal law." LINDA MULLENIX ET AL., UNDERSTANDING FEDERAL COURTS AND JURISDICTION 279 (1998). A claim under the ATS would thus arise under federal law. *See id.* at 280 (including admiralty and maritime claims within this category, not just federal questions).

245. MULLENIX, *supra* note 244, at 279.

246. Koh, *supra* note 236, at 180.

that would mitigate these difficulties of unlimited jurisdiction while providing an equivalent remedy to the problem of accountability.

A. The Problems of Unlimited Universal Jurisdiction

Universal jurisdiction has many critics. This Note focuses its analysis on the specific flaws of unlimited universal jurisdiction, flaws that a requirement of some connecting link would remedy. Part IV.A.1 raises arguments as to the legitimacy of exercising unlimited jurisdiction against individual defendants, while Part IV.A.2 addresses state concerns of sovereignty and comity. Finally, Part IV.A.3 compares the success of universal jurisdiction prosecutions based on connecting links to those without any. As these arguments demonstrate, unlimited universal jurisdiction has more problems and fewer benefits than universal jurisdiction with connecting links.

1. Legitimacy

A primary argument against unlimited jurisdiction is that the defendant has not authorized the prosecuting state to exercise its judicial power over him in any way. In theory, governments derive their authority from the consent of the governed.[247] Actual or implied consent by the individual is required in order to justify the exercise of power by the state.[248] With unlimited jurisdiction, that consent is lacking; the Guatemalan defendants most certainly did not consent to being prosecuted for genocide by Spain. When some connection exists, consent can be implied from that link: set foot on Spanish soil and be subjected to Spanish law; victimize Spanish nationals and be subjected to Spanish law. But when Spain takes upon itself the role of the world's policeman and asserts the power to vindicate any victim anywhere, the authority to do so is not derived from the consent of the governed.[249] A

247. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, . . . [t]hat to secure these [inalienable] rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .").

248. *See* John Locke, *An Essay Concerning the True Original, Extent, and End of Civil Government*, *in* TWO TREATISES OF GOVERNMENT 267, 330 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689) ("Men being, as has been said, by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own *Consent*."); *see also id.* at 330–33, 350–53 (articulating the social contract theory of government).

249. *See* Glenn Greenwald, *Germany's Claim to "Universal" Power over Other Countries' Citizens*, UNCLAIMED TERRITORY, Nov. 15, 2006, http://glenngreenwald.blogspot.com/2006/11/

democratic deficit exists between the law that the defendant has consented to live under and the law under which he is judged. Unlimited jurisdiction flies in the face of the social contract theory of government, and any academic suggestions that international law affirmatively supports a norm of unlimited jurisdiction, and thus supersedes democracy and the social contract, are merely wishful thinking.[250]

If the state derives authority for unlimited jurisdiction from the condemnation of the crimes committed, then the basis of the authority comes, not from democracy, but from the moral authority of the international order—as interpreted unilaterally by the judiciary of one state.[251] But arguments that the horrendous nature of the crime or ending a culture of impunity justify universal jurisdiction are, at their core, assertions that the ends justify the means—with no other logical basis for support.[252] Granted, the ends (prosecuting heinous war criminals) are compelling and the means (violating Guatemala's sovereignty or disregarding the rights of the accused) may be less compelling, but major moral and philosophical lines of thought oppose such a formula.[253] When a state derives its prosecutorial authority from the more mundane, more customary basis of ordinary self-interest accompanying a nexus to the

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germanys-claim-to-universal-power-over.html (last visited Sept. 29, 2009) ("[O]ne country . . . arrogat[ing] unto themselves the right of 'universal jurisdiction'—basically the power of a world government—seems rather dangerous and un-democratic in the extreme. 'Consent of the governed' is the linchpin of the legitimate exercise of government power, and it is utterly lacking with . . . universal jurisdiction.") (on file with the Washington and Lee Law Review).

250. *See supra* Part II.B (analyzing international law and concluding that unlimited jurisdiction finds no support there).

251. *Cf.* Bassiouni, *supra* note 28, at 43 (discussing universal jurisdiction's early roots in monotheistic theology). Universal jurisdiction derived from the moral authority of *jus cogens* is not too dissimilar from, say, the universal moral authority claimed by the Ayatollah Khomeini to issue a *fatwa* sentencing Salman Rushdie to death for heresy (though obviously the crimes each moral authority purports to have authority over vary widely). *Id.* at 276 n.20.

252. Greenwald, *supra* note 249. Greenwald states:

> It doesn't matter how bad of a person one thinks [the defendant] is or how criminal one thinks his conduct is. None of that justifies having him prosecuted by a foreign government in which he has no democratic representation and no input and which has no unique connection to his alleged crimes . . . .

Id.

253. *Compare* Plato, *Crito*, *in* THE LAST DAYS OF SOCRATES 79, 88 (Hugh Tredennick and Harold Tarrant trans., Penguin rev. ed. 2003) (n.d.) ("SOCRATES: So one ought not to return an injustice or an injury to any person, *no matter what the provocation*. . . . [B]etween those who think so and those who do not there can be no shared deliberation . . . ." (emphasis added), *with* KISSINGER, *supra* note 14, at 279 ("[A] universal standard of justice should not be based on the proposition that a just end justifies unjust means, or that political fashion trumps fair judicial procedures.").

prosecuting state, then consent is fulfilled and no appeal needs to be made to the ubiquitous moral authority of *jus cogens*.

Unlimited jurisdiction also proves troublesome because it undermines a fundamental cornerstone of international criminal law—the presumption of innocence until proven guilty.[254] If jurisdiction depends solely upon the severity of the crime, in order for a court to hear the case it must make a preliminary finding that the defendant grossly violated international law.[255] Courts regularly make, without prejudice, similar findings on matters of indictment, admissibility of evidence, etc. But no legal issue is so fundamental as jurisdiction, and no finding is so prejudicial as jurisdiction based upon the defendant's commission of heinous atrocities. When jurisdiction is derived solely from the heinousness of the defendant's crimes, judges gain the power to hear the case by making preliminary determinations that the defendant committed more serious crimes: genocide rather than murder, crimes against humanity rather than rape. Judges should limit the extent to which they enlarge their own power,[256] and any *sua sponte* enlargement of the scope of judicial power justified by a righteous cause bodes ill for both the defendants before the court and society as a whole.[257] Universal jurisdiction with connecting links mitigates this conflict to some degree by requiring a basis for jurisdiction greater than just the gravity of the crime.

This particular judicial conflict of interest can be seen as part of a broader problem with due process, a problem which further deprives unlimited jurisdiction of legitimacy. Some nexus with the prosecuting state is generally seen by courts as a requirement in order to uphold the due process rights of the defendant:

> As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable functions. It protects the defendant against the

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254. *See* Rome Statute of the International Criminal Court art. 66, *adopted* July 17, 1998, 2187 U.N.T.S. 90 (guaranteeing a presumption of innocence until proven guilty beyond a reasonable doubt for defendants).

255. *See, e.g.*, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION Principle 1(3) (2001) ("A state may rely on universal jurisdiction as a basis for seeking . . . extradition . . . provided that it has established a prima facie case of the person's guilt . . . .").

256. *See* Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 GEO. WASH. L. REV. 52, 53 (2007) (noting the separation-of-powers and conflict-of-interest concerns that arise when courts determine the scope of their own powers).

257. *See* KISSINGER, *supra* note 14, at 273 ("[H]istorically, the dictatorship of the virtuous has often led to inquisitions . . . .").

> burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns . . . .[258]

As many first-year law students can attest, civil jurisdiction over civil defendants is complicated enough because of due process concerns; criminal law, with its stronger emphasis on the rights of defendants, should require at least the same (and probably a greater) standard of due process so that "the defendant's conduct and connections with the forum State" are enough to justify "being haled into court there."[259] Surely the inconvenience of defending oneself in a distant, unfamiliar forum is far more prejudicial to—and due process should accordingly be greater for—a criminal defendant than a civil defendant.

Unfortunately, universal jurisdiction's lack of selectivity in its application cheapens the use of universal jurisdiction. When Belgium indicts Colin Powell alongside Saddam Hussein and Ariel Sharon alongside Yasser Arafat,[260] a problem exists. Part of the problem was undoubtedly due to the peculiar Belgian institution through which complaints could be brought,[261] but even without this added wrinkle, the issue of prosecutorial discretion remains. How is a state to decide which international criminal to prosecute first under unlimited universal jurisdiction? With no connection to the prosecuting state, an equal interest exists in bringing all of them to justice, beginning with the most heinous. Realistically, it seems more likely that prosecutors and investigating judges will pursue the cases which will best advance their careers. Why prosecute petty crooks when you can go after génocidaires?[262]

The fact remains that, without some connecting link, the prosecutor has no stake in the local conditions where the crime was committed, and the community where the crime was committed has no say in the outcome of the

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258. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980) (citations omitted). While *World-Wide Volkswagen* dealt with civil, not criminal, jurisdiction, some courts have extended its logic to the due process rights of criminal defendants. *See, e.g.*, United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998) ("The nexus requirement serves the same purpose as the 'minimum contacts' test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a defendant who 'should reasonably anticipate being haled into court' in this country." (citing *World-Wide Volkswagen*, 444 U.S. at 297)).

259. *World-Wide Volkswagen*, 444 U.S. at 297.

260. *Supra* notes 114–16 and accompanying text.

261. *See supra* note 108 and accompanying text (describing how foreign victims may bring suits in Belgium).

262. *Cf.* William A. Schabas, *National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes,"* 1 J. INT'L CRIM. JUST. 39, 39 (2003) (labeling genocide "the crime of crimes").

trial.[263] "The local community must confront the crime that has occurred among its people and seek a nuanced resolution that they can live with. When the local community tries the case, other countries can recognize the legitimacy of their interest and are likely to honour their decision . . . ."[264] But because a state exercising unlimited jurisdiction has no connection to the defendant or the local conditions, the truths that it produces are less likely to be complete.[265] At best universal jurisdiction trials will be good faith efforts to replicate a local tribunal; at worst they will be self-serving show trials. Most will fall in between, unconsciously internalizing the perspectives and prejudices of the prosecuting state. This unilateral approach to atrocities occurring in other countries can hardly be expected to produce consistent results in sync with the views of the victimized country and the international community.[266] When a single national court takes it upon itself to enforce international law, why should the result be legitimate in the eyes of the world?

2. *Sovereignty and Comity*

If "[j]urisdiction is a manifestation of a State's sovereignty,"[267] then the exercise of unlimited jurisdiction is the manifestation of one state's sovereignty within the borders of another state. When, in the absence of connecting links, Spanish judges assert jurisdiction over a Guatemalan or Chinese defendant, Spain is inserting its sovereign authority into the (equally sovereign) territory of Guatemala or China. International law is somewhat against this; after all, the UN Charter states: "The [United Nations] Organization is based on the principle of the sovereign equality of all its Members."[268] Insofar as sovereignty is a principle of international law, any statement to the effect that "there is no basis for finding that [unlimited] universal jurisdiction . . . is

263. *See* George P. Fletcher, *Against Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 580, 583 (2003) (discussing the interests of the community where the crime was committed).

264. *Id.*

265. *See, e.g.*, MARK DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 84 (2007) (criticizing Belgian courts trying cases of Rwandan genocide for producing "monodimensional and partial narratives" which "permit the former colonial state to cleanse its [past] wrongdoing and appear heroic in its quest for justice").

266. *See, e.g.*, *supra* note 4 and accompanying text (discussing Rose Kabuye's extradition to France for trial based upon an unorthodox view of the Rwandan genocide).

267. Sentencia Tribunal Supreme [STS], Feb. 25, 2003, *translated in* 42 I.L.M. 686, 697 (2003).

268. U.N. Charter art. 2, para. 4.

contrary to other principles of international law" is false,[269] and a justification of the doctrine based upon the dicta of the *Lotus* case—that whatever is not prohibited by international law is permitted—fails.[270] This commitment to sovereign equality is unqualified—it exists for all states, even the ones harboring war criminals. It would clearly violate sovereignty for Spain to attempt to extradite and prosecute China's common criminals; are former heads of state any different?[271]

But perhaps this dilemma can be avoided through the following formulation: A state which exercises unlimited universal jurisdiction to punish violations of international law does so as an agent of the international community, not as a mere state. The question then becomes the following: How does a state become an agent of the international community? So far, states like Belgium and Spain have tried to exercise unlimited universal jurisdiction, not at the request of the international community or even another state, but *sua sponte*. If only human-rights respecting, rule-of-law upholding, "good" states (i.e., Western nations) possess the ability to deputize themselves on behalf of the international community, while "bad" states cannot, this rationale too falls afoul of sovereign equality. If all states were empowered to use unlimited universal jurisdiction, the result would be a "judicial chaos."[272] The results were ridiculous but harmless when the independent Belgian judiciary neutrally indicted world leaders, but imagine what would happen if courts in other countries, under pressure from the ruling regime, began proceedings against its political enemies.[273]

This persistent argument against universal jurisdiction—that it cuts both ways, that any state can use it as a tool both for and against justice—is an accurate assessment. This inherent flaw in every scheme of universal jurisdiction which permits prosecution without connecting links, without some

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269. STS, 42 I.L.M. at 710 (dissent).

270. *Supra* note 92.

271. *Cf.* BECCARIA, *supra* note 1, at 84 ("Some have pretended, that in whatever country a crime . . . be committed, the criminal may be justly punished for it in any other: as if . . . a man could live in one country and be subject to the laws of another, or be accountable for his actions to two sovereigns, or two codes of laws, often contradictory.").

272. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 44 (Feb. 14) (separate opinion of President Guillaume). President Guillaume continues: "Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward." *Id.*

273. *See The Princeton Principles on Universal Jurisdiction*, *in* UNIVERSAL JURISDICTION, *supra* note 28, at 18, 19 ("Improper exercises of criminal jurisdiction, including universal jurisdiction, may be used merely to harass political opponents, or for aims extraneous to criminal justice.").

specific stake in the outcome, cannot be fixed. It is an innate aspect of unilateral prosecutions by national courts. Recognizing a need for connecting links in order to obtain legitimacy could successfully create a heuristic distinguishing between acceptable practice and abuse, but restricting the practice of unlimited jurisdiction will be impossible if it becomes an accepted international norm. Any restrictive international regime that attempts to limit the countries exercising universal jurisdiction only to those states that use it responsibly will be decried as imperialist or Eurocentric by the third-world nations and human rights offenders that it excludes. Truly universal jurisdiction is too dangerous a tool for all states to possess; because it cannot be restricted to just the states that would use it wisely, it must be denied to all.

Major concerns of peace versus justice also arise when one state exercises universal jurisdiction without any connecting links over the pardoned war criminals of another state.[274] Peaceful transitions from dictatorship to democracy are often conditioned on amnesty and pardons for the former tyrants.[275] Unlimited jurisdiction could make peace negotiations more difficult, potentially increasing transaction costs by giving disinterested third-parties a veto over an agreement by the wronged party not to prosecute to a degree that universal jurisdiction with connecting links will not.[276] A fundamental tenet of international law is that an agreement between two states cannot "create either obligations or rights for a third State without its consent."[277] Thus, two parties to a peace settlement cannot extinguish the rights of a third state to prosecute defendants for crimes committed against it. A requirement of connecting links decreases the group of potential prosecutors from every state to just those states which possess some connection to potential defendants, enabling the parties to better identify any future threats to peace and resolve them in the peace negotiations.

Indictments and resulting requests for extradition also raise serious concerns about unlimited jurisdiction. Simply put, requests for extradition alarm and provoke defendants. When Spain indicted the four defendants in the Guatemala case, the former police chief and former Defense Minister were

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274. *See generally* Leila Nadya Sadat, *Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable, in* UNIVERSAL JURISDICTION, *supra* note 28, at 193, 196–212 (discussing the conflict between universal jurisdiction and amnesty in terms of the peace vs. justice debate).

275. *Id.*

276. *See* Eugene Kontorovich, *The Inefficiency of Universal Jurisdiction*, 2008 U. ILL. L. REV. 389, 391 (treating universal jurisdiction as a broad standing rule and analyzing it from an economic standpoint).

277. Vienna Convention on the Law of Treaties art. 34, *done* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

arrested by Guatemalan authorities and the former head of the Secret Police fled and is now missing, while the ex-president holed up in his house.[278] Who knows how future defendants will react? Perhaps by deciding that they have nothing left to lose. The academics and activists who applaud the potency of universal jurisdiction fail to realize that Spain's actions have had uncontrollable consequences in Guatemala, consequences that could have been much more severe.

In addition to disrupting another state's chosen reconciliation process, universal jurisdiction can also threaten that society's peaceful existence. As Professor Roht-Arriaza notes:

> The powerful military and civilian figures who order such crimes usually retain a large amount of power—*de jure* or *de facto*—even after the conflict ends or the government changes and are singularly uninterested in criminal investigations into the past. In contrast, the post-armed conflict state tends to be weak, with limited resources and a culture of corruption and self-dealing among state authorities.[279]

Universal jurisdiction injects instability into this fragile post-conflict balance of power. Foreign indictments and extradition requests for war criminals with strong bases of power could result in more than mere flight: Leaders pardoned by their own country but prosecuted by a foreign nation could rally their supporters to resist arrest or even return to the fight. In the (unlikely) worst case scenario, defendants reacting to the exercise of universal jurisdiction could restart a civil war. At best, an extradition request could cause a defendant, supposedly innocent until proven guilty, to be held by the requested state for an indefinite period of time until the highest echelon of the judiciary determines the country's position on universal jurisdiction.[280] Somewhere in between is the prospect that a defendant facing extradition might simply choose to disappear. Maybe (would foreign prosecutors consider this?) a state prefers to have an unindicted war criminal at a known location rather than an indicted war criminal at an unknown location. A foreign power's exercise of universal jurisdiction, even through a simple extradition request, makes it harder for a

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278. Roht-Arriaza, *supra* note 15, at 80. *But see* Roht-Arriaza, *supra* note 128, at 316 ("At least one defendant in [Spain's prosecutions], Jorge Acosta, reportedly came out of hiding and turned himself in to an Argentine court after Judge Garzón in Spain asked Interpol to track him down.").

279. Roht-Arriaza, *supra* note 15, at 80–81.

280. *See, e.g.*, *id.* at 80 ("After over a year in detention, the defendants were freed when Guatemala's Constitutional Court ('GCC') decided on December 12, 2007 that it would not honor Spanish arrest warrants or extradition requests.").

state to postpone investigation of atrocities until it feels that the time is right and its own society is ready.

When the disregard of international comity through the exercise of universal jurisdiction may result in bloodshed, preserving comity becomes a much more compelling concern. What guaranty is there that states will refrain from prosecuting war criminals when doing so would disrupt the internal peace processes of another state? Prosecutorial discretion, as discussed previously,[281] is woefully inadequate; unlimited universal jurisdiction has already been used to indict such heinous criminals as Rose Kabuye, Colin Powell, and George H. W. Bush.[282] Future prosecutors and judges likely will be less sensitive to the effects their actions have upon distant communities than to the desires of their own constituencies, and a post-conflict state's choice between reconciliation and justice can be negated and superseded by the exercise of unlimited jurisdiction half a world away.

3. Impotence

The most damning critique of unlimited universal jurisdiction is this: No successes exist under universal jurisdiction when there are no connecting links.[283] Unlimited jurisdiction, as a system, simply is not working. Its flaws would be more tolerable if it managed to secure convictions (after all, the professed goal of universal jurisdiction is to put an end to impunity), but, despite hundreds of indictments,[284] unlimited jurisdiction has never even resulted in a trial.[285]

The proponents of universal jurisdiction often point out the positive effects that the doctrine achieves. The "Pinochet effect," for example, has been used to describe the immense transformation, away from impunity and towards a greater focus on human rights, which was catalyzed by the arrest of General Pinochet in Britain.[286] Other benefits of transnational prosecutions are also

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281. *Supra* notes 260–62 and accompanying text.

282. *Supra* notes 4, 116 and accompanying text.

283. *Supra* notes 115, 139 and accompanying text; *see also* Parts II.C.1–2 (chronicling the rise and fall of unlimited jurisdiction in Belgium and Spain, respectively).

284. *Supra* note 133 and accompanying text.

285. *See* REYDAMS, *supra* note 37, at 118 ("This situation fuels the criticism that the proceedings *in absentia* against the world's villains are window-dressing.").

286. *See generally* NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (2005) (describing the Spanish legal efforts against Argentine and Chilean defendants, including Pinochet, and examining their implications for transnational justice and human rights).

stressed: the expertise gained by local lawyers dealing with complex international law,[287] the strengthening of domestic court systems,[288] the catalysis of domestic prosecutions,[289] and greater political awareness.[290] As Professor Roht-Arriaza, a prominent advocate of human rights, argues: "The success of [transnational prosecutions], like that of international prosecutions more generally, should be measured not only (or even principally) by how many convictions they secure, but at how well they succeed in changing the possibilities for justice at home."[291]

But it is questionable whether these (admittedly valuable) aspirational benefits should be the goal of judges. These benefits are, after all, nonlegal; it is one thing for victims' advocates to file a quixotic lawsuit in order to obtain greater political awareness, and another for a judge to entertain it for that reason. After a certain point, the quest for justice becomes political.[292] The response of Judge Gómez to the Guatemalan Constitutional Court's ruling[293] is not typical judicial behavior; it delves into the realm of foreign policy, which might be best left to elected officials. One of the common threads in the Belgian and Spanish prosecutions is the accessibility of the judicial process to victims, and thus to grass-roots efforts to effect change.[294] If other national and international institutions were as open to the needs of victims, resort to the judiciary would not be necessary in order to achieve aspirational benefits.

B. Solutions

This Note would be remiss to point out the failings implicit in universal jurisdiction without endeavoring to offer some modest proposal to ameliorate them. Part IV.B.1 attempts to expound a limited version of universal jurisdiction, exercised only where connecting links exist, as a superior option to unlimited universal jurisdiction. Part IV.B.2 recommends expansive civil jurisdiction as an auxiliary to consider when a lack of connecting links would

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287. Roht-Arriaza, *supra* note 15, at 88–90.

288. *Id.* at 90–94.

289. Roht-Arriaza, *supra* note 128, at 315.

290. *Id.* at 315–16.

291. Roht-Arriaza, *supra* note 15, at 106.

292. *See* KISSINGER, *supra* note 14, at 277–79 (criticizing universal jurisdiction's intrusion into the realm of politics).

293. *Supra* notes 162–64 and accompanying text.

294. *Supra* Parts II.C.1–2.

preclude criminal prosecution via universal jurisdiction. Finally, Part IV.B.3 explores other jurisdictional options for perpetrators of international crimes.

1. Universal Criminal Jurisdiction with Connecting Links

All of the problems described in Part IV.A are mitigated by a requirement of some nexus between the accused and the prosecuting state. When there are connecting links, the state should be allowed to try the defendant under the doctrine of universal jurisdiction. In the absence of any connection to the defendant, the state should not try the case or even attempt to extradite the defendant for trial. The main practical distinction between unlimited universal jurisdiction and universal jurisdiction with connecting links is the scope of judicial power: Unlimited jurisdiction enables judges to act as "knights errant" questing out and smiting the "enemies of all mankind" wherever in the world they may be,[295] whereas universal jurisdiction with connecting links typically "goes not abroad, in search of monsters to destroy."[296] The requirement of some nexus focuses judicial efforts within the territory of the prosecuting state, ensuring that the country is no safe haven for human rights violations and only permitting judicial sorties abroad when justified by some connection to the prosecuting state.

What qualifies as a connecting link? No narrow definition should be applied to the term; a court should be free to tailor the concept to the specific fact pattern of the case before it—within reasonable bounds. But the precedents, plausibility, and logical coherence of the court's legal justifications will go a long way toward proving that the court is legitimately acting in good faith. The presence of the defendant in the prosecuting state's territory is the most obvious of all connecting links and has been used by academics to categorize theoretically weaker forms of universal jurisdiction.[297]

Other connections could also qualify as the prerequisite nexus, such as the consent of the defendant, the consent of the defendant's state of nationality,[298] a pre-existing commitment by the prosecuting state to defend the victims,[299] or

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295. *Supra* note 1 and accompanying text.

296. Representative John Quincy Adams, Address to the House of Representatives (July 4, 1821), *in* THE OXFORD DICTIONARY OF QUOTATIONS 3 (Elizabeth Knowles ed., 6th ed. 2004).

297. *See* INAZUMI, *supra* note 20, at 54 (describing universal jurisdiction in classical international law as a "*supplemental* (secondary) jurisdiction which was exercised only after other jurisdictions had failed . . . and after efforts to extradite had been exhausted").

298. *See supra* note 183 and accompanying text (discussing consent by flag states for American prosecution of drug traffickers).

299. *See* The Zyklon B Case, 1 L.R.T.W.C. 93, 103 (Brit. Mil. Ct. 1946), *available at*

other, more amorphous links.[300] Exact delineation of what constitutes a connecting link is impossible, though the rough standard should be that the connecting link amounts to actual or implied consent to jurisdiction. Courts, while recognizing the requirement, should feel free to apply it flexibly yet impartially to the facts before them.

All of these suggestions could plausibly be used to support the proposition that the defendant consented in some way to the state's exercise of jurisdiction. What should not qualify as connecting links for the purposes of universal jurisdiction are mere superficialities: Cultural, historical, social, linguistic, and legal connections between two countries should not suffice for the exercise of jurisdiction.[301] Such broad characteristics would lead to a form of judicial imperialism by European states over former colonies. A common language cannot reasonably be used to argue that the defendant consented to jurisdiction or that the sovereignty of another state remains unmolested; it lends itself more as one of many factors to figure into a *forum non conveniens* analysis if multiple states compete for jurisdiction.

2. *Expansive Civil Jurisdiction*

In addition to universal criminal jurisdiction with connecting links, extensive civil jurisdiction should also be available to provide an additional method of reducing impunity. While victims should always have the option of

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http://www.loc.govrr/frd/Military_Law-reports-trials-war-criminals.html (basing jurisdiction on the grounds that, *inter alia*, "the United Kingdom has a direct interest in punishing the perpetrators of crimes if the victim was a national of an ally engaged in a common struggle against a common enemy"); *see also* The Belsen Trial, 2 L.R.T.W.C. 1, 128 (Brit. Mil. Ct. 1945), *available at* http://www.loc.govrr/frd/Military_Law-reports-trials-war-criminals.html (mentioning the trial, conviction, and execution of a Japanese defendant by a British tribunal for war crimes committed on French territory against American nationals); Cowles, *supra* note 48, at 177–78, 217 (arguing for Allied universal jurisdiction over Nazi war crimes in World War II). UN peacekeeping in Rwanda during the genocide, and the concomitant deaths of Belgian peacekeepers because of their nationality, would be a good argument for a nexus between Belgium and Rwandan génocidaires. REYDAMS, *supra* note 37, at 109. The attack on the Spanish embassy by the Guatemalan military, which was provoked by the nonviolent seizure of the embassy by demonstrators, could also be argued to create a nexus between Spain and the defendants involved in the embassy incident, though this nexus should not be extended to cover the entire genocide in Guatemala.

300. *See, e.g.*, CrimC (Jer) 40/61 Attorney General of Israel v. Eichmann (*Eichmann I*), 36 I.L.R. 18, 52–54 (1961) (discussing the connections between the defendant, his crimes, the Jewish people, and the state of Israel).

301. *But cf.* Sentencia Tribunal Supremo [STS], Feb. 25, 2003 *translated in* 42 I.L.M. 686, 711 (2003) (dissent) (arguing that these types of connections between Spain and Guatemala should meet the requirement of connecting links).

seeking civil redress from their tormentors, civil liability becomes especially attractive when criminal prosecution is impossible or unlikely. The only connection between the defendant and the forum state would be the minimum contacts, including proper service of process, required for due process. Courts should be willing to stretch due process to the extreme, especially if doing so is necessary to ensure that a forum exists in which plaintiffs can be heard, and minimum contacts should be satisfied by the presence of the defendant's assets as an alternative to the presence of the defendant. Judges should remove all unnecessary obstacles to having the case heard on its merits.

A hierarchy of contact between defendants and states is thus created: At one end of the spectrum lie the elements for the traditional bases of jurisdiction (such as nationality), then come the connecting links for limited universal jurisdiction, and then the minimum contacts which due process mandates in a civil suit. At the other end is the complete dearth of connection between the defendant and the prosecuting state under unlimited universal jurisdiction. The system this Note proposes rationally gives greater due process rights to criminal, rather than civil, defendants.

Civil jurisdiction intrudes upon state sovereignty much less than the exercise of universal jurisdiction.[302] While foreign litigation could override a post-conflict country's chosen method of reparations and restitution, surely that is less intrusive than universal jurisdiction overriding choices of amnesty and reconciliation. The foreign state merely provides a neutral forum in which plaintiffs may adjudicate their claims, thus avoiding the adversarial role required in criminal prosecutions.[303] The forum court may even apply relevant foreign and international law, so that the rights of the parties remain unchanged regardless of the venue where the claim is adjudicated.[304] In theory, a U.S. court hearing a case under the ATS is simply duplicating an existing forum which the plaintiff, for various reasons, has chosen to forego.

Civil suits preserve the law and order of other states, threatening a defendant's finances, not his freedom. Criminals will conceivably resist arrest and extradition by any means necessary; after all, what do they have to lose? Service of process, on the other hand, is unlikely to provoke such an extreme response. A civil judgment may embarrass, entangle, or impoverish

302. REYDAMS, *supra* note 37, at 2–3; *see also* Filartiga v. Pena-Irala, 577 F. Supp. 860, 862 (E.D.N.Y. 1984) ("Where the principle of international law is as clear and universal as the Court of Appeals has found it to be, there is no reason to suppose that this court's assumption of jurisdiction would give justifiable offense to Paraguay.").

303. REYDAMS, *supra* note 37, at 3 n.14.

304. *Id.*

defendants, but it will not incarcerate them—and so seems unlikely to endanger the safety of their neighbors. While the use of civil liability against corporations involved in a developing country's economic growth could cause a chilling effect on international investment in countries with poor human rights records, existing legal and evidentiary standards seem sufficient to protect international businesses from unwarranted harassment.[305]

Civil cases also have to meet lower standards of due process than criminal prosecutions, improving the chances of finding the defendant culpable.[306] The civil standard of a preponderance of evidence is lower than criminal law's requirement of proof of guilt beyond a reasonable doubt.[307] And punitive damages, which are "designed to obtain objectives fostered chiefly by criminal law, are nevertheless made without at least some of the safeguards afforded by that law, such as proof beyond a reasonable doubt and presumption of innocence."[308]

Other procedural hurdles are also lower in civil trials. Acquiring personal jurisdiction over the defendant in order to commence the trial in the first place is far simpler for civil suits than criminal prosecutions.[309] Extradition is unnecessary, and the delays and hazards[310] it entails are thus avoided. The defendant's presence at trial is unnecessary, and default

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305. *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 639 (S.D.N.Y. 2006) (granting the corporate defendant's motion to dismiss based upon the plaintiffs' inability to produce sufficient evidence showing that Talisman Energy violated international law, or aided and abetted violations of international law, while investing in Sudan). For a comprehensive discussion of accomplice liability under the ATS, see generally Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008).

306. *See* Sarkin, *supra* note 201, at 173 (comparing criminal and civil trials and noting that "the civil standard is the lesser in a civil case").

307. *Cf.* Rome Statute of the International Criminal Court art. 66, *adopted* July 17, 1998, 2187 U.N.T.S. 90 (guaranteeing a presumption of innocence until proven guilty beyond a reasonable doubt for defendants).

308. Filartiga v. Pena-Irala, 577 F. Supp. 860, 866 (E.D.N.Y. 1984).

309. *Compare* Grace v. MacArthur, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (acquiring valid personal jurisdiction over a passenger flying above the state of Arkansas when service of process occurred in mid-air), *with Israel General 'Avoids UK Arrest,'* BBC NEWS, Sept. 12, 2005, http://news.bbc.co.uk/2/hi/uk_news/4237620.stm (last visited Sept. 29, 2009) (reporting how Israeli General Doron Almog evaded a British arrest warrant based on universal jurisdiction by simply not leaving his plane when it landed in London) (on file with the Washington and Lee Law Review). Attempting to arrest war criminals in the lobby of Manhattan's Hotel Intercontinental or London's Heathrow Airport endangers lives in a way that serving process does not. *See* BOTTIGLIERO, *supra* note 216, at 54 n.34, 62 n.56 (describing service of process on defendants of claims under the ATS while they are in New York City for meetings at the United Nations).

310. *Supra* notes 278–80 and accompanying text.

judgments are common under the ATS.[311] Procedural difficulties may arise in enforcing the judgment,[312] but it is better to experience these problems after a judgment has been entered than before the defendant is even in the custody of the court.

Best of all, civil suits actually get results. It is far easier to win a lawsuit under the ATS than to place a defendant on trial using universal jurisdiction.[313] As emphasized above, universal criminal jurisdiction makes the news not because of any success in prosecuting heinous criminals, but because of how outrageous and pointless the prosecutions can be. If Spain continues to indict Chinese officials committing genocide in Tibet,[314] the motivation for doing so is probably not any realistic hope of extradition and conviction. Most prosecutions based on universal jurisdiction without connecting links fail after extradition is refused (and it usually is).[315] Instead, the purpose of these prosecutions is aspirational, highlighting to the world the plight of the Tibetan people. The aspirational and ideological value of failed criminal indictments are often emphasized: "[A]t a minimum, they would serve as a valuable historical record and a validation of witness testimony. The indictments would also serve as a powerful tool . . . to pursue new avenues of investigation and prosecution."[316] But successful civil suits can fulfill the same investigatory, condemnatory roles, without the negative side effects of unlimited universal jurisdiction.

Indeed, civil jurisdiction has a proven record of producing judgments against actual violators of international law.[317] The plaintiffs in *Filartiga* were

311. *See, e.g.*, Mushikiwabo v. Barayagwiza, No. 94 Civ. 3627 (JSM), 1996 U.S. Dist. LEXIS 4409, at *3 (S.D.N.Y. 1996) (granting the plaintiffs in an ATS case default judgment); Xuncax v. Gramajo, 886 F. Supp. 162, 202 (D. Mass. 1995) (same).

312. *See* BOTTIGLIERO, *supra* note 216, at 66 ("Unfortunately, at present the recognition and enforcement of foreign judgments abroad remain at the same time one of the more important elements and perhaps the weakest point in the domestic implementation of redress.").

313. *See, e.g.*, *supra* note 309 (highlighting one of many lower procedural hurdles under civil liability).

314. *Supra* note 165 and accompanying text.

315. *See* Cynthia van Maanen, *What Does Universal Jurisdiction Mean for the Future of the Sovereign State?*, QUANTITATIVE PEACE, Aug. 28, 2008, http://www.globalpolicy.org/intljustice/universal/2008/0828sovereign.htm (last visited Sept. 29, 2009) ("While courts can assert their right to prosecute any crime against humanity, whether it takes place within their territory or not, one must question the value of such legal motions without international enforcement.") (on file with the Washington and Lee Law Review).

316. Roht-Arriaza, *supra* note 15, at 101.

317. Compare the default judgment that the plaintiffs obtained against the former Guatemalan Minister of Defense in Xuncax v. Gramajo, 886 F. Supp. 162, 202 (D. Mass. 1995), with the protracted and ultimately fruitless Spanish indictment of the Guatemalan defendants, *supra* Part II.D.2.

awarded $10,385,364 in damages on remand.[318] Dozens of plaintiffs winning their suits under the ATS have been awarded thousands of dollars in compensatory damages and millions in punitive damages.[319] Granted, these astronomical awards of punitive damages are typically never going to be paid in full to the plaintiffs. For example, the plaintiffs have only collected four hundred dollars from General Suarez-Mason.[320] But while the plaintiffs in the Marcos class action have yet to receive any compensation, the judgment did deprive the estate of $450 million in assets hidden in Switzerland.[321] Regardless of their final enforceability, these judgments "have vindicated the individual plaintiffs, allowing them to confront their tormentors and have the truth told."[322]

The aspirational value of a civil judgment against a war criminal should be as great, if not greater, than a criminal indictment and unfulfilled request for extradition. A civil judgment, even a default judgment against an absent defendant, provides some measure of vindication to the plaintiff. Though "it is difficult to conceive of any civil remedy which can begin to compensate the plaintiffs for their loss or adequately express society's outrage at the defendant's actions,"[323] awarding several million dollars of punitive damages condemns the behavior of the defendant more than any mere indictment, especially if that indictment is simply the latest ploy in a long line of politicized maneuvers.

3. Other Considerations for Criminal Jurisdiction

When a defendant is already being prosecuted under universal jurisdiction based on connecting links, adding additional charges against that defendant

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318. Filartiga v. Pena-Irala, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

319. *See* SHELTON, *supra* note 209, at 164–70 (listing ATS cases and the compensatory and punitive damages awarded).

320. *Id.* at 172 n.316.

321. *See supra* note 216 (discussing the enforcement of the judgment against assets in Swiss banks).

322. SHELTON, *supra* note 209, at 172.

323. Mushikiwabo v. Barayagwiza, 94 Civ. 3627 (JSM), 1996 U.S. Dist. LEXIS 4409, at *1 (S.D.N.Y. 1996). The court continued:

> This Judge has seen no other case in which monetary damages were so inadequate to compensate the plaintiffs for the injuries caused by a defendant. One can not place a dollar value on the lives lost as the result of the defendant's actions and the suffering inflicted on the innocent victims of his cruel campaign. Unfortunately, however, a monetary judgment is all the Court can award these plaintiffs.

Id. at *6.

which lack connecting links does not seriously undermine comity, sovereignty, or legitimacy.[324] Early Spanish prosecutions did this, emphasizing Spanish victims at first and adding non-Spanish victims after investigation began.[325] Such a tactic adds legitimacy to exercises of universal jurisdiction, but it also spares the defendant the inconvenience of multiple trials. Any requirement of connecting links will eventually be fulfilled when the defendant is present in that state's custody (and the additional charges added then), so an initial indictment or extradition request should be free to include them. This "supplemental" jurisdiction should be exercised only for charges against the same defendant, not for the same charge against different defendants. Thus, a nexus to one defendant who committed genocide, for example, would be insufficient to establish a nexus to other co-offenders who by themselves had no connection to the prosecuting state.

Another possible solution to the problems caused by *national* courts exercising universal jurisdiction is an *international* court exercising universal jurisdiction. Though some opponents of universal jurisdiction also oppose any international tribunal, even they would prefer that to arbitrary, piecemeal prosecutions by national courts.[326] The specter of one world court bringing international criminals to justice would have far more legitimacy than a single Spanish or Belgian judge.[327] Even multiple states acting collectively would appear more legitimate than one country's courts acting unilaterally.

V. Conclusion

The uninhibited exercise of unlimited universal jurisdiction has led to innumerable indictments, sensational headlines, and minimal accountability. The noble goals which unlimited jurisdiction attempted to achieve have not been met, and ICJ Judge Francisco Rezek's adage proves true: "Any policy adopted in the name of human rights but not in keeping with that discipline

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324. *Cf.* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (formulating a doctrine of pendent jurisdiction over nonqualifying claims when accompanied by qualifying claims and derived from a "common nucleus of operative fact").

325. Roht-Arriaza, *supra* note 128, at 314.

326. *See, e.g.*, KISSINGER, *supra* note 14, at 279 ("To the extent that the ICC replaces the claim of national judges to universal jurisdiction, it greatly improves the state of international law.").

327. *See* Kontorovich, *supra* note 276, at 392 ("Even assuming the need for an international prosecutorial power, that authority should be located in one or a few clearly identified entities rather than in all states. The centralization of prosecutorial authority would . . . allow it to be put to its highest-value use.").

threatens to harm rather than serve that cause."[328] Unlimited jurisdiction has failed to succeed because states take umbrage at unfounded interference in their affairs; beyond a certain point the exercise of jurisdiction by the courts of one state over the population of another crosses a line and violates international norms of sovereignty.[329]

The nexus requirement for the exercise of criminal jurisdiction utilizes a preexisting legal distinction to demarcate exactly where that line is, and minimizing opposition to universal jurisdiction. Like all legal rules, inequity can result when the rule is consistently applied, but the debate over universal jurisdiction must transcend individual cases and attempt to produce the best solution to competing interests of sovereignty and accountability, peace and justice. Universal criminal jurisdiction with connecting links should permit prosecution when the state has a legitimate interest in the case, while, through the exercise of broad civil jurisdiction, victims who fail to find a connecting link can still have a forum in which to seek financial redress and emotional closure from their tormentors. This formulation represents the best way to solve the potential problems of universal jurisdiction without sacrificing the interests of justice.

Hopefully, universal jurisdiction is a temporary solution to the temporary problem of impunity for international crimes. Commitment to the rule of law, stronger judiciaries, and growing accountability should reduce the need for third-parties to provide redress for violations of international law. Until that day comes, however, until "an end to dependence on arbitrary power and opinion, have provided security for oppressed innocence and hated virtue—until universal reason . . . has confined tyranny . . . , the persuasion that there is not a foot of soil upon which real crimes are pardoned would be a most efficacious way of preventing them."[330]

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328. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 94 (Feb. 14) (separate opinion of Judge Rezek).

329. *Cf.* THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776) (complaining of subjection "to a jurisdiction foreign to our constitution and unacknowledged by our laws").

330. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 61 (Henry Paolucci trans., Bobbs-Merrill 1963) (1764).